



10-1975

## Planned Parenthood of Central Missouri v. Danforth

Lewis F. Powell Jr.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

DISCUSS

February 7, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. A-656, - Planned Parenthood v. Danforth

Missouri has a new abortion statute. It has been challenged in the Eastern District of Missouri. A three-judge court, by a divided vote, upheld most of the statutory provisions that were attacked. A Notice of Appeal has been filed.

The plaintiffs seek a stay of the enforcement of the statute during the pendency of the appeal here. If I were to act alone, I would grant the stay, but in view of the nature of the subject matter, and the differences in our respective views, I am referring the matter to the Conference for consideration on February 14.

I have asked the Clerk to prepare copies of the stay application and of the two opinions for each of you. In the meanwhile, I enclose a copy of a brief memorandum prepared by one of my clerks. The memorandum is self-explanatory and generally expresses my own views.

Sincerely,

*H. A. B.*

A-656

Planned Parenthood of Central Missouri v. Danforth

Application for Stay of Enforcement of Statute Pending Appeal

Petrs seek a stay of the application and enforcement of certain Missouri state statutes limiting abortions. Petrs sought temporary and permanent injunctive relief from the three-judge district court (Webster, Wangelin, Harper), but such relief was denied. They have not sought a stay pending their appeal of the DC decision from the DC because they believe such an action would be futile given the previous rulings in this case. Petrs ask that this Court stay the enforcement of the statute pending determination of their appeal by this Court. [Notice of appeal was filed on Feb. 5, 1975. See ¶7 of petn.]

The statute in question became effective on June 14, 1974. The challenged provisions include the following:

(I) No abortions will be allowed during the first trimester unless (1) the woman first certifies her consent in writing and also states that the consent is voluntary

(2) the woman's spouse consents (unless it is a medical emergency to preserve the mother's life) in writing

(3) the woman's parent consents if the woman is unmarried and under 18.

II. The doctor must attempt to preserve the life of the fetus as if no abortion was being attempted. Otherwise he will be guilty of manslaughter.

III. If a live infant is born, he becomes the ward of the state and the parents have no parental rights.

IV. The technique of saline amniocentesis is found deleterious to maternal health and prohibited after the first trimester.

V. There are various record-keeping requirements.

Petr's are the Planned Parenthood group and several doctors. The DC found the doctors to have standing and pretermitted the standing of PP. The DC upheld all provisions of the statute save that which required the doctor to attempt to preserve the life of the fetus. This provision was found to be unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability. Judge Webster would have found unconstitutional as well the provisions requiring spousal and parental consent, the provision terminating parental rights if the child is born alive, and the provision prohibiting the saline amniocentesis method.

I believe that there is a strong likelihood that the Court will note the appeal. Several of the provisions found unconstitutional by Judge Webster are indeed constitutionally suspect, and I believe that the case will be found to be a good vehicle for exploring these questions. There is greater question, however, whether the enforcement of the statutes left standing by the DC should be stayed pending a decision to note the appeal. The harm alleged is that pending the appeal hundreds of women per month will be denied abortions as a result of the enforcement of the provisions. I tend to doubt Petr's characterization of these effects as being "catastrophic and irreparable." However, one might wonder what harm there would be if the operation of the statute were stayed, in view of the fact that the state operated



without any similar statute between Jan. 22, 1973 and June 14, 1974.

My recommendation would be to bring the application to the attention of the Conference. If the Court seems disposed to note the appeal, then the stay should be granted. If not, then a stay would be significantly less appropriate.

Given the relative lack of harm to the state by the grant of a stay, and the greater harm to those individuals who will be denied abortions if no stay is ordered, I personally would favor granting the stay.

*KNM 2/6/75*



Note

DISCUSS  
DISCUSS

3 1/2 Ct maintained no.  
Abortion Statute - which  
raises several questions  
unanswered by Roe & Doe.  
There are conflicts.

PRELIMINARY MEMO

May 9, 1975 Conf  
List 1, Sheet 1

Note.

No. 74-1151

PLANNED PARENTHOOD  
v.

App from USDC (EDMo.) 3 1/2 Ct  
(Harper, Wangelin DJs;  
Webster, dissenting in part)

DANFORTH (Mo. Atty.  
Gen.)

Federal/ Civil

Timely

This case presents some substantial issues in the wake of Roe and Doe, and the 3JC decision conflicts with various others on almost every count. The parental and spousal consent issues are very troubling; the "viability" limit is probably reasonable, though not within the letter of Roe and Doe; and the provisions designed to save the infant when possible present a substantial issue of balancing the mother's rights against the state's concern for the child. Decision on these issues will be difficult, but I do not think the Court can avoid them.

SUMMARY: Appellants brought suit before a three-judge district court, challenging the constitutionality of Missouri's comprehensive abortion statute which went into effect June 14, 1974. With the exception of one of the nine challenged provisions, the USDC upheld the statute. Appellants now seek review, and the Attorney General of Missouri has filed a statement recommending that the Court note jurisdiction. Enforcement of the statute was stayed by this Court on February 18, 1975.

Decision on these issues will be difficult, but I do not think the Court can avoid them.

FACTS: The Missouri legislature passed the "House Committee Substitute for House Bill No. 1211" in late April of 1974, and it was signed into law on June 14, 1974. Three days later, this suit was filed challenging the following provisions, §2(2), §3(2), §3(3), §3(4), §6(1), §7, §9, §10, and §11, which provide as follows:

"Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

\* \* \*

"(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

\* \* \*

"Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

\* \* \*

"(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

"(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

"(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

*Roe  
defunctum*

(This is ~~the~~ the first  
trimester.)



\* \* \*

"Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

\* \* \*

"Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411 (sic), RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

\* \* \*

"Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

"Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

[Strangely, <sup>although</sup> the saline induction method is used with some frequency in the first trimester, where it is more dangerous than other available methods, the legislature chose to forbid it in the latter stages, when it is the least dangerous method. My speculation is that they were

Why?

more concerned with the survival rate of the infant than of the mother. Other late-stage abortion methods have a greater likelihood of delivering a live infant.]

"2. The forms shall be provided by the state division of health."

"3. All information obtained by physicians, hospitals, clinics or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data reported by local, state, or national public health officers."

"Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years."

The USDC upheld all of the challenged provisions except the underlined sentence in §6(1) which the court concluded to be "unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability."

§2(2) was challenged because it did not define viability in terms of trimesters; the USDC concluded that Roe & Doe recognized the end of the second trimester as a mere approximation of viability and that it was a matter of physician judgment.

§3(2) was challenged as "chilling" the woman's rights, but the court thought this a reasonable requirement to insure that the physician has not suborned the patient's will and that the consent is voluntary.

§3(3) and §3(4) which require consent of a spouse or a parent (if the woman is under 18) were thought justified by the state's interest in "protecting the integrity of the marriage unit" and in "safeguarding the authority of the family relationship". Circuit Judge Webster dissented, believing the woman's right to be paramount to that of her spouse or her parents.

§7 which terminates parental rights if an aborted fetus is born alive was upheld by the USDC on the ground that the "immediate concern must be for the care and protection of the infant." Judge Webster dissented, concluding that this section "is totally lacking in procedural due process".

§9 which prohibits the use of the "saline amniocentesis" method of abortion after the first trimester was upheld as being reasonably related to the protection of maternal health, since this method exposes a woman to the danger of severe complications. Judge Webster in dissent noted that this section outlawed a procedure now employed in 75% of all second and third trimester abortions; that the method has a mortality rate lower than that of childbirth and is significantly safer than the alternative procedures (hysterotomy and hysterectomy) which are not prohibited; and that this is precisely the kind of unwarranted interference with the doctor-patient relationship that infringes constitutional rights.

§10 and §11 which pertain to the maintenance of records were upheld as necessary to insure the acquisition of data for "the advancement of medical knowledge."

CONTENTIONS: Appellants emphasize that not a single provision of the sort here challenged has been upheld by any court since Roe and Doe were handed down, and in fact have been regularly struck down in a number of reported decisions.

§2(2): Doe v. Rampton, 366 F.Supp. 189 (D.D.C. 1973); Hodgson v. Hodgson, 378 F.Supp. 1008 (D.Minn. 1974), app. dismissed sub nom. Spennard v. Hodgson, 95 F.Ct. 819 (1975);

Planned Parenthood v. Fitzpatrick, No. 74-2440 (E.D.Pa., filed Sept. 20, 1974), application for stay of injunction denied sub nom Wohlgemuth v. Planned Parenthood, 95 S.Ct. 769 (1975).

(woman's consent)

§3(2):<sub>^</sub> rejected in Rampton, supra; Hodgson, supra; Wolfe v. Schoering, No. C-74-186-L[B] (W.D.Ky., filed Nov. 19, 1974); and Planned Parenthood, supra.

(husband's consent)

§3(3):<sub>^</sub> rejected in Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Coe v. Gerstein, 376 F.Supp. 695 (S.D. Fla. 1973); Planned Parenthood, supra. Cf. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

(parent's consent)

§3(4):<sub>^</sub> rejected in Foe v. Vanderhoof, No. 74-F-418 (D. Colo., filed Feb. 5, 1975); Planned Parenthood, supra; Wolfe, supra; Coe, supra; Rampton, supra; Word v. Poelker, 495 F.2d 1349 (8th Cir. 1974).

(declaring live infant a ward of the state)

§7:<sub>^</sub> rejected in Rampton, supra. Cf. Stanley v. Illinois, 405 U.S. 645 (1972).

(saline induction)

§9:<sub>^</sub> rejected in Wolfe, supra.

(record-keeping)

§10 & §11:<sub>^</sub> rejected in Rampton, supra; Word, supra; Planned Parenthood, supra.

The state attorney general waived a formal response.



of this. This looks to be as good a case as any to  
 clear up the confusion surrounding application of Roe and Doe.  
 It is obvious that this statute is designed to throw as many  
 roadblocks as possible in the way of abortion, and it would be  
 wise for the court to identify which ones are legitimate and  
 which are not. In light of so many cases going the other way,  
 to let this one stand without writing on it would be terribly  
 confusing.

There is a waiver of response.

4/23/75

Haney

USDC opw in  
 juris. state.

Conference 5-9-75

Court USDC, E.D. Mo.

Voted on....., 19...

Argued ....., 19...

Assigned ....., 19...

No. 74-1151

Submitted ....., 19...

Announced ....., 19...

PLANNED PARENTHOOD OF CENTRAL MISSOURI, ET AL., Appellants

vs.

JOHN C. DANFORTH, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

3/12/75 Appeal filed

*Bill Brennan says a 3 9/ct in CA1 has recently (in April 1975) decided a case contrary to this Mo. case. Thus we have direct conflict. Harry says dissent is correct.*

Note

*Relisted for Harry to write 5/30/75*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.				✓									
White, J.				✓									
Stewart, J.				✓									
Brennan, J.				✓									
Douglas, J.				✓									
Burger, Ch. J.													

*C.J. not ready to reverse*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 10, 1975

Re: No. 74-1151 - Planned Parenthood of Central  
Missouri v. Danforth  
No. 74-1419 - Danforth v. Planned Parenthood  
of Central Missouri

Dear Chief:

These appeals appear on List 3, Sheet 1 for June 12.  
I must ask that they be put over for another week.

Sincerely,

H. G. B.

The Chief Justice

cc: Mr. Michael Rodak  
The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 17, 1975

Re: No. 74-1151, Planned Parenthood of Central  
Missouri v. Danforth  
No. 74-1419, Danforth v. Planned Parenthood  
of Central Missouri

Dear Harry,

I agree with your proposed Per Curiam in these  
cases.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

OFFICE OF  
JUSTICE HARRY A. BLACKMUN

June 17, 1975

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1151 - Planned Parenthood of Central  
Missouri v. Danforth  
No. 74-1419 - Danforth v. Planned Parenthood  
\_\_\_\_\_ of Central Missouri \_\_\_\_\_

At the end of the material on the page following page 14  
in my circulation of this morning, I propose to add:

"See also Armstrong v. Manzo, 380  
U. S. 545 (1965)."

H.A.B.

Supreme Court of the United States  
Washington, D. C. 20543

MEMORANDUM FOR  
JUSTICE WM. J. BRENNAN JR.

June 17, 1975

DISCUSS

RE: Nos. 74-1151 - Planned Parenthood of Central Missouri  
74-1419 v. Danforth

Dear Harry:

I agree with your proposed Per Curiam in these cases.

Sincerely,

*J. Brennan*

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice  
Mr. Justice  
Mr. Justice

See my  
Mr. Justice  
Mr. Justice  
Mr. Justice  
marginal  
notes

No. 74-1151 - Planned Parenthood of Central  
Missouri, et al. v. Danforth, et al.  
No. 74-1419 - Danforth v. Planned Parenthood  
of Central Missouri

6/17/75  
Received

PER CURIAM.

These cross-appeals are taken from the decision of a statutory 3-judge panel of the United States District Court for the Eastern District of Missouri. The court denied in part and granted in part injunctive and declaratory relief that had been requested with respect to Missouri's abortion legislation recently enacted by the State's Seventy-Seventh General Assembly. The statute in question, known as House Committee Substitute for House Bill 1211 (and hereinafter referred to as HCS 1211), was approved by the Governor and became effective June 14, 1974. It imposes a strict code for the regulation of abortions in Missouri during all stages of pregnancy, and requires, among other things, the husband's consent to the abortion and where the woman is unmarried and under the age of 18 years, the consent of one of the woman's parents or of the person in loco parentis to her. The statute is set forth in full as the appendix to this opinion. We granted an application for stay of its enforcement pending appeal. 429 U.S. 915 (1975).

Appellants in No. 74-1151 (hereinafter referred to as appellants) are Planned Parenthood of Central Missouri, a not-for-profit Missouri





Attorney General of Missouri and the Circuit Attorney of the City of St. Louis, as representative of the class of Missouri prosecution attorneys.

The particular provisions of the statute that the appellants challenge are § 2(2), defining the term "viability"; § 3(2), requiring from the woman, prior to submitting to an abortion, a certification in writing that she consents to the procedure and that her consent is informed and freely given and is not the result of coercion; § 3(3), also requiring consent of the woman's spouse unless the abortion is certified by a licensed physician to be necessary in order to preserve the mother's life; § 3(4), also requiring the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of 18 years, unless the abortion is certified by a licensed physician as necessary in order to preserve the mother's life; § 4(1), requiring the physician to exercise professional care to preserve the life and health of the fetus and, failing such, deeming him guilty of manslaughter and making him liable in an action for damages; § 7, declaring an infant who survives an attempted abortion not performed to save the life or health of the mother an abandoned child of the state under jurisdiction of the juvenile court and depriving the mother, and also the father if he consented to the abortion, of parental rights; § 9, prohibiting, after the first twelve weeks of pregnancy, the abortion method known as saline amniocentesis; and §§ 10 and 11.



Nos. 74-1151, have taken an appeal from that part of the District Court's judgment holding § 641 unconstitutional and enjoining enforcement thereof.

## II

In Roe v. Wade, 410 U.S. 113 (1973), and in Doe v. Bolton, 410 U.S. 179 (1973), we undertook a detailed and thorough analysis of the constitutionality of state abortion statutes that proscribed abortion except where necessary to preserve the life or health of the mother. We there determined that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Roe v. Wade, 410 U.S., at 153. On the other hand, we recognized that, at certain stages of pregnancy, there are important state interests, in safeguarding maternal health and in protecting the potentiality of human life, that become compelling. We ruled that the permissibility of state regulation should be viewed in three stages: "In the light of present medical knowledge," id., at 163, for the stage prior to approximately the end of the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," id., at 164, without interference from the State. Thereafter, however, the State may, if it chooses, regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and

protection of maternal health. Id. Finally, for the stage subsequent to viability, a point we carefully left flexible and dependent upon developments in medical ability, id., at 160,<sup>1/</sup> the State may establish regulations to protect the life of the fetus and may even proscribe abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the mother, id., at 163-165.

We, of course, agree with the District Court that the physician-appellants clearly have standing, Doe v. Bolton, 410 U.S., at 188, and that, therefore, we need not reach the issue as to the standing of Planned Parenthood, id., at 189. Our primary task, however, is to consider each of the challenged provisions of the new Missouri abortion statute in the light of our

opinion in Roe and Doe. We turn to this task:

*Valid* *OK* 1. Section 2(2) of the statute defines "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems. Appellants urge that this definition violates and conflicts with the discussion of viability in our opinion in Roe. In particular, appellants object to the failure of the definition to incorporate and reflect the three stages of pregnancy test, to the use of the word "indefinitely," and to the extra burden of regulation imposed. In the District Court appellants urged that a statutory definition of viability should be directed to a specific point in time, such as the end of the 24th week, or about the end of the second trimester.

In our discussion in Roe, we used the term "viable" to signify the point when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." Id., at 160. We repeated that at this point "the fetus then presumably has the capability of meaningful life outside the mother's womb," Id., at 163, and we noted that this stage usually was reached at about 7 months or 28 weeks but may occur earlier. Id., at 160.

We agree with the District Court that the definition of viability in the new Missouri statute does not conflict with what we said in Roe. In fact, we believe that the statutory provision reflects an earnest attempt to comply with our observations and discussion relating to viability. We do not find it improper for the State to leave to the physician the determination as to whether the fetus is potentially able to survive outside the mother's womb, and thus we do not accept appellants' contention that a specific number of weeks must be fixed by statute as the point of viability. Wolfe v. Schroeder, 388 F. Supp. 631, 637 (W.D. Ky. 1974); Hodgson v. Anderson, 378 F. Supp. 1018, 1016 (Miss. 1974), dismissed for want of jurisdiction sub nom. Spannaus v. Hodgson, 420 U.S. 903 (1975).<sup>2/</sup> Moreover, we see no merit in appellants' objection that the definition of viability in the Missouri statute violates Roe's "trimester differentiation test."<sup>3/</sup> In the current state of medical knowledge no fetus is viable at the end of the first trimester, see Roe, 410 U.S., at 160, and the point of viability itself separates two state-

of pregnancy in which certain state regulation is constitutionally permissible. Thus, there is no possibility that the definition in § 2(2) of the Missouri statute can be used to circumvent the limitations on state regulation outlined in Roe.

2. Under § 3(2) of the Missouri statute, a woman seeking an abortion,

ever during the first trimester, must certify her consent in writing and must

also certify that the consent "is informed and freely given and is not the

result of coercion." Appellants object that this requirement violates the

three-stage test established in Roe and imposes an extra layer and burden

of regulation on the abortion decision. See Doe v. Bolton, 410 U.S., at

197-200. The District Court, on the other hand, viewed the statutory re-

quirement as one that "insures that the pregnant woman retains control over

the discretions of her consulting physician," \_\_\_\_ F. Supp., at \_\_\_\_,

and suggested that the requirement was not materially different from the

consent requirement for other medical operations.

Our decisions in Doe and Roe clearly establish that states may

not impose added burdens of any kind upon the decision of the physician and

his patient regarding abortion during the first trimester of pregnancy. From

this it clearly follows that, to the extent that § 3(2) imposes in the first tri-

mester a consent requirement which differs from the consent normally

required for similar medical procedures, the statute is unconstitutional. 4

*Invalidated  
9 am  
uncommented  
on this  
point*

*But why? (See #7 - Record Keeping)*

*I see  
no burden  
here*



See Wolfe v. Schroering, 388 F. Supp., at 636. And, to the extent that the statute imposes additional consent requirements in the second stage of pregnancy that are not reasonably related to the protection of maternal health, those requirements also do not withstand constitutional scrutiny. See Hodgson v. Anderson, 378 F. Supp., at 1017.

3. Section 3(3) requires the written consent of the spouse of the woman seeking an abortion at any stage of pregnancy, unless the abortion is certified by a licensed physician to be necessary in order to preserve the mother's life. Appellants contend that this provision, which obviously affords the husband the right to prevent an abortion, whether or not he is the father of the fetus, not only violates the rulings in Roe and Doe but also conflicts with a variety of lower court opinions. See, e.g., Coe v. Gerstein, 376 F. Supp. 695, 697-698 (S. D. Fla. 1973), appeal dismissed for want of jurisdiction and certiorari before judgment denied, 417 U.S. 279 (1974); Wolfe v. Schroering, 388 F. Supp., at 636-637; Doe v. Rampton, 366 F. Supp. 189, 193 (Utah 1973). Cf. Doe v. Doe, \_\_\_\_\_ Mass. \_\_\_\_\_, 314 N. E. 2d 128 (1974); Jones v. Smith, 278 S. 2d 339 (Fla. Ct. App. 1973), cert. denied, 415 U.S. 958 (1974).

In Roe and Doe we specifically reserved decision on the question whether a requirement of consent by the father of the fetus, by the husband of the mother, or by a parent of an unmarried minor, may be constitutionally

*no American briefs*

*inverted what about father's*

*not to prosecute?*

*State could make it a ground of divorce?*

But each parent  
has rights in  
a child's custody  
& welfare.

imposed. See Roe v. Wade, 410 U.S., at 165, n. 67. We now hold that the State may not constitutionally require the consent of the husband, as is specified under § 3(3) of the Missouri statute, as a condition for abortion at any stage of pregnancy. We thus agree with the dissenting judge in this case, and with the courts whose decisions are cited above, that the State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." \_\_\_\_ F. Supp., at \_\_\_\_\_. Clearly, since the State cannot regulate or prescribe abortion during the first trimester, when the physician and his patient make that decision, the State cannot delegate authority to any particular person to restrict abortion during that same period. And the only restrictions that are permissible during the second stage of pregnancy are those that are reasonably related to protection of maternal health. Roe v. Wade, supra.

We are not unaware of the deep and proper concern and interest that most husbands have in the pregnancy of their wives and in the development of the fetuses they carry. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Maynard v. Hill, 125 U.S. 195 (1888). Moreover, we recognize that the decision whether or not to undergo an abortion may have profound effects on the future of any marriage, effects that

I should  
say so.

are both physical and mental, desirable and deleterious. Notwithstanding these factors, we cannot find that the State has the constitutional authority to give to the husband the unilateral power to prohibit the wife from terminating her pregnancy, when the State itself lacks that right. See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

It seems manifest that the decision to terminate a pregnancy ideally should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and so vital an issue. But the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, is not to be achieved by giving the husband a veto power exercisable for any reason whatsoever or no reason at all. Even if the State did have the ability to delegate to the husband a power it could not itself exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship," \_\_\_\_\_ F. Supp., at \_\_\_\_\_. <sup>41</sup>

4. Section 3(4) requires the consent of one parent or person in loco parentis where the woman is unmarried and under 18 years of age,

unless, again, the abortion is certified by a licensed physician as neces-

sary to preserve the life of the mother. Appellants challenge this provision

*Involved  
Protected by OK  
from  
is whether  
minor is  
mature enough*

on the ground that it permits the State to delegate to a parent authority which the State itself does not have, that it violates the three-stage test of Roe, and that it, too, imposes an extra layer and burden of regulation. Moreover, the District Court's decision upholding this provision conflicts with rulings of other courts. Goe v. Gerstein, *supra*; Wolfe v. Schmorring, *supra*; Doc v. Vanderhoof, 389 F. Supp. 947 (Colo. 1975); Baird v. Bellotti, \_\_\_ F.2d \_\_\_, (CA 1 1975); State v. Koome, 84 Wash. 2d 901, 530 Pac. 2d 260 (1975).

We agree with appellants and with the courts whose decisions are so cited that the State may not impose a blanket provision, such as that in § 3(4), requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor. Just as with the requirement of consent from the husband, *id.*, here, the State does not have the authority to give a third party an absolute veto power over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the stage of pregnancy and regardless of the reason for withholding consent.

Constitutional rights do not magically come into being when one attains the age of majority. Minors, as well as adults, are protected by the Constitution. See, e.g., Brand v. Jones, \_\_\_ U.S. \_\_\_ (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines School, 393 U.S. 503 (1969); In re Gault, 387 U.S. 1 (1967). The Court, *id.*, *supra*.



long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Ginsberg v. New York, 390 U.S. 629 (1968). It remains, then, to examine whether there are any significant state interests in conditioning abortion on the consent of a parent or person in loco parentis that are not present in the case of an adult.

One interest that is suggested is the safeguarding of the family unit and of parental authority. The District Court majority referred to this interest. \_\_\_\_\_ F. Supp., at \_\_\_\_\_. It is, however, difficult to conclude that providing one parent the power to veto a determination, made by the physician and the minor patient, to terminate the patient's pregnancy will strengthen the family unit. Neither is it likely that this veto power will strengthen parental authority or control where the minor and the non-consenting parent are fundamentally in conflict. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

We emphasize that by invalidating § 3(4) we do not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. If a minor is incapable of giving informed consent, <sup>(4)</sup> the appropriate concerned party, whether parent or

*Invalid  
I agree  
OK*

5. Section 7 applies "where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother." The statute then provides that the infant "shall be an abandoned ward of the state" and that the mother -- and the father, too, if he consented to the abortion -- "shall have no parental rights or obligations whatsoever relating to such infant." Appellants urge that this section deprives parents of all parental rights without due process or, indeed, without any hearing, and that it is constitutionally impermissible under Stanley v. Illinois, 405 U.S. 645 (1972).

The statutory provision deprives the parents of any and all rights of parenthood with respect to the infant, and does not provide even minimal opportunity for hearing before making the infant a ward of the State. The statute plainly deprives the parents of their due process rights by preventing them from even attempting to show that they have not abandoned their child or that they will be fit parents. See id., at 657-658. Since we determined in Stanley that all parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," id., at 658, to deny this right to certain parents under § 7 of the Missouri law is unconstitutional.



We cannot accept the construction of § 7 by the District Court's majority who suggested, \_\_\_\_ F.Supp., at \_\_\_\_, that parents subject to § 7 are permitted notice and hearing before termination of parental rights. The statute flatly removes all parental rights "as if the parental rights had been terminated pursuant to section 211.41), RSMo." (emphasis added). Although we agree with the majority that the statute referred to should have been § 211.41), rather than § 211.41), the plain meaning of § 7 is that suggested by the dissenting judge, \_\_\_\_ F.Supp., at \_\_\_\_: "The parents' rights are terminated upon birth of the child, as if the normal hearing provisions of § 211.41 already had been complied with. There is no requirement or even suggestion under § 7 that the termination of parental rights occurs only after a proper court finds abandonment or unfitness of the parents, as § 211.41 provides."

no  
hearing

*Invalid*

6. Section 9 of the statute prohibits the use of saline amniocentesis, as a method or technique of abortion, after the first twelve weeks of pregnancy. It does so on the ground that the technique "is deleterious to maternal health." Appellants challenge this provision on the ground that it precludes virtually all abortions after the first trimester. This is so, it is claimed, because over 75% of all abortions performed in the United States after the first trimester are effected through this procedure. Appellants urge that the alternative methods of hysterotomy and hysterectomy are significantly more critical and dangerous for the mother than the saline technique, and also suggest that the mortality rate for childbirth exceeds that where saline amniocentesis is employed. Finally, appellants note that the perhaps safer alternative of prostaglandin instillation is not widely used in this country.

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We held in Roe v. Wade that after the first trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." 410 U.S., at 164. The question with respect to § 9, therefore, is whether the prohibition of saline amniocentesis is a regulation which "reasonably relates to the preservation and protection of maternal health." Id., at 163.

*Q*

The District Court's majority determined on the basis of the evidence before it that the mortality rate in childbirth exceeds the mortality rate in cases where saline amniocentesis is used. Therefore, the majority acknowledged, § 9 could be upheld only if there were available alternative safe methods of inducing abortion after the first trimester. \_\_\_\_ F. Supp., at \_\_\_\_.

Referring to such methods as hysterotomy, hysterectomy, "mechanical means of inducing abortion," and prostaglandin injection, the majority concluded that at least the latter two techniques were safer than saline amniocentesis. Consequently, the majority concluded that the restriction in § 9 could be upheld as reasonably related to maternal health.

We feel that the majority in reaching its conclusion failed to appreciate three significant factors. First, it did not recognize the prevalence of use of saline amniocentesis in this country; this, as noted above, is about 75% of all post first trimester abortions. Second, it did not recognize that there are severe limitations on the availability of the prostaglandin technique, which was used only on an experimental basis until less than two years ago. See Wolfe v. Schroering, 388 F. Supp., at 637, where it is said that at that time (1974) "there are no physicians in Kentucky competent in the technique of prostaglandin amnio infusion." Finally, the majority did not consider the anomaly

of § 9 which proscribes the use of saline but does not prevent surgical techniques that may be ten times more likely to result in maternal death. See dissenting opinion, \_\_\_\_\_ F.Supp., at \_\_\_\_\_, n. 8. These three factors place the State's decision to bar use of the saline method in a completely different light. The State, through § 9, would prohibit the use of a method which is the one most commonly used by physicians after the first trimester and which is safer from the viewpoint of maternal mortality than even continuation of the pregnancy until normal childbirth. In this light, the regulation no longer appears as a reasonable one for the protection of maternal health, but rather as a regulation designed to inhibit the vast majority of abortions after the first trimester. As such, the regulation cannot constitutionally stand. See Wolfe v. Schroeder, 338 F.Supp. , at 637.



7. Sections 10 and 11 establish broad record keeping

requirements for health facilities and for physicians involved

in abortions in all phases of pregnancy. Under § 10 all such

facilities and physicians are supplied with forms "the purpose and function of which shall be the preservation of maternal

health and life by adding to the sum of medical knowledge through

the compilation of relevant maternal health and life data and to

monitor all abortions performed to assure that they are done only

under and in accordance with the provisions of the law." The

information on the forms is to be confidential and used only for

statistical purposes. The records, however, may be inspected

by "local, state, or national public health officers." Under § 11

the records are to be kept for seven years in the permanent files

of the health facility where the abortion was performed.

Appellants object to these reporting and record keeping

provisions on the ground that they impose an extra layer and

burden of regulation, and that they apply throughout all stages of

pregnancy. All the judges of the District Court panel, however,

viewed these provisions as statistical requirements "essential to

the advancement of medical knowledge," and saw nothing that

would restrict either the abortion decision itself or the exercise

of medical judgment.

*Involved*

*I don't agree. But the confidentiality should be safeguarded.*

We conclude that there are important conflicting interests ~~potentially~~ affected by the record keeping requirements. On the one hand, maintenance of such records indeed may be helpful in developing information pertinent to the preservation of maternal health. On the other hand, as we carefully outlined in Roe v. Wade, during the first trimester of pregnancy the State may impose no restrictions or regulations governing the medical judgment of the pregnant woman's attending physician to terminate her pregnancy, 410 U.S., at 163, 164. Furthermore, it is apparent that one reason for the record keeping requirement, viz., to insure that all abortions in Missouri are performed in accordance with Bill 1711, fades into insignificance in view of our invalidation of the consent requirement for abortion in the first trimester.



Record keeping and reporting requirements that are reasonably directed at the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible after the first trimester of pregnancy. This is so because after that stage the State may enact substantive as well as record keeping regulations that are reasonable means of protecting maternal health. During the first trimester, however, when the State is not permitted to interfere with the deliberations between the physician and his patient as to the wisdom of terminating the patient's pregnancy, the State may impose no record keeping requirements that significantly differ from those placed on other similar medical procedures. <sup>61</sup> Since the Missouri statute applies the record and reporting requirements specifically to all abortions at all stages of pregnancy, we are unable to uphold those provisions in their present form.

*Invalid*

8. Appellees appeal in No. 74-1419 from the unanimous decision of the District Court that § 6(1) of the Missouri statute is unconstitutional. That section provides:

*I am inclined to disagree*

"No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

*Court rule then to apply only when there is a possibility of delivering a live fetus.*

Any physician or assistant who fails to undertake such degree of care is deemed guilty of manslaughter if the death of the child results, and is also liable in an action for damages. The District Court held that the provision was unconstitutionally overbroad because it failed to exclude from its reach the stage of pregnancy prior to viability.

\_\_\_\_ F. Supp., at \_\_\_\_.

*But if started before viability, fetus can't live*

Appellees argue that the District Court's interpretation is erroneous and unnecessary. They urge that § 6(1) establishes a general standard of care which applies only where a live-born fetus results from an abortion, that is, a live-born fetus is to be treated no differently if it results from abortion than if it results from a normal birth. They contend that § 6(1) should be read in

*In any event, decision should not invalidate this provision except to extent it may be read or applied to 1st & 2nd Trimesters. Overbroad doctrine not applicable.*

its entirety to apply only after the abortion is completed and only to a live-born infant. Under this interpretation, the standard of care established by § 611 would be inapplicable while the physician is performing the abortion.

We are unable to accept appellees' interpretation. The statute requires the physician to exercise the prescribed skill, care, and diligence to preserve the life and health of the fetus, without specifying that such care need be undertaken only after the stage of viability, as defined in Roe v. Wade, has been reached. As the provision now stands, it impermissibly requires the physician to preserve the life and health of a fetus, whatever the stage of pregnancy, and whether the fetus is delivered or undelivered. The fact that the second sentence of § 611 refers to a criminal penalty where the physician fails "to take such measure to endanger or to sustain the life of the child, and the death of the child results," does not modify the duty imposed in the previous sentence nor that that duty to pregnant women that have reached the stage of viability. We thus agree with the District Court that § 611 is unconstitutionally overbroad for failing to limit the duty to preserve the life and health of the fetus to, at most, the stage of pregnancy after viability.

In view of the unconstitutionality of a number of the provisions of Bill 1211, the only question remaining is whether these provisions are severable from the rest of the statute, or whether the entire statute falls. Resolution of this question is influenced by § B of Bill 1211, declaring the provisions of the Act to be severable and stating that the invalidity of any provision does not affect the other provisions "which can be given effect without the invalid provision."

It should be manifest that not only the provisions specifically invalidated but also other sections dependent on these provisions do fall. Thus, for example, § 4, applying the consent requirements of § 3 to an abortion performed after the first trimester, and § 5, requiring the woman to be warned that any live-born infant resulting from abortion becomes a ward of the State, would not survive. To the extent that provisions remain that are independent from these constitutionally impermissible sections, as, for example, § 3(1), requiring that an abortion be performed by a duly licensed consenting physician, these provisions would appear to be protected by the severability provision. See Roe v. Wade, 410 U.S., at 16<sup>2</sup>. But inasmuch as the constitutionality of these other sections was not specifically before us on these appeals, we are to be understood as expressing no final views thereon.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Douglas took no part in the consideration or decision of these appeals.



Viability is usually placed at about seven months  
(28 weeks) but may occur earlier, even at 24 weeks. Roe v.  
Wade, 410 U.S. 113, 163 (1973).

21

The Minnesota statute at issue in Roe v. Wade provided that a fetus "shall be considered potentially viable" if born through the gestation period or, in other words, at 28 weeks after conception. Noting that no evidence of viability at 28 weeks had been presented, the three-judge district court there found the definition of viability unreasonable and unconstitutional. 378 F.Supp.2 at 1016.

3/

We find no other provision in the Missouri statutes which specifically details the type of consent required of a patient before a medical or surgical procedure may be undertaken by the physician. Apparently the only other Missouri statutes concerned with consent for general medical or surgical care relate to persons committed to state tuberculosis hospitals, Rev. Stat. Mo. § 199.240, or to mental or correctional institutions, Id. § 195.700.

of We recognize, of course, that when a woman, with the approval of her husband, without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that where the wife and the husband disagree on this decision, the views of only one partner can be decisive. Since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, it is appropriate that her wishes be permitted to control. See Roe v. Wade, 410 U.S., at 153.

2 In order to give informed consent, a minor must be capable of understanding the procedure, and of appreciating the consequences of the procedure and other alternative courses of action.



Nos. 74-1151, 74-1419

2/ We find no comparable record-keeping requirement in the Missouri statutes for other medical or surgical procedures of similar degree.

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to such family member's coverage, also provide that the health insurance benefits applicable for children shall be payable with respect to a newly born child of the insured or subscriber from the moment of birth.

SECTION 2. The coverage for newly born children shall consist of coverage of injury or sickness including the necessary care and treatment of medically diagnosed congenital defects and birth abnormalities.

SECTION 3. If payment of a specific premium or subscription fee is required to provide coverage for a child, the policy or contract may require that notification of the birth of a newly born child and payment of the required premium or fees must be furnished to the insurer or nonprofit service or indemnity corporation within 31 days after the date of birth in order to have the coverage continue beyond such 31 day period.

SECTION 4. The requirements of this act shall apply to all insurance policies and subscriber contracts delivered or issued for delivery in this state more than 120 days after the effective date of the act.

Approved June 12, 1974.

Effective 90 days after adjournment.

## APPENDIX

~~[ACT 76]~~

### ~~ABORTION—REGULATIONS—PENALTIES~~

#### H.C.S. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3). "Physician", any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

SECTION 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 5. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

SECTION 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

SECTION 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

SECTION 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

SECTION 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.



2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seven years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.

Supreme Court of the United States  
Washington, D. C. 20543

CHIEF JUSTICE  
JUSTICE THURGOOD MARSHALL

June 18, 1975

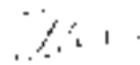
Re: No. 74-1151 -- Planned Parenthood of Central Missouri v.  
Danforth, et al.  
No. 74-1419 -- Danforth v. Planned Parenthood of Central  
Missouri

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Dear Harry:

I agree with your Per Curiam.

Sincerely,

  
T.M.

Mr. Justice Blackmun

cc: The Conference



Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart

Mr. Marshall  
Mr. 1st of Powell ✓

Chlorophyll:

Rec'd on: 6/18/75

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STILWIS - 11-11-11

SUPREME COURT OF THE UNITED STATES

PLANNED PARTITION OF CENTRAL MISSOURI  
 SOUTH BY MR. JOHN C. DANFORTH  
 ATTORNEY GENERAL OF THE  
 STATE OF MISSOURI

17. 34. 9. 2. 1

JOHN C. DANFORTH, ATTORNEY GENERAL  
OF THE STATE OF MISSOURI  
PLANNED PARENTHOOD OF  
CENTRAL MISSOURI, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF MISSOURI

No. 71115, 271110 50-6411 1967

## PLATE CXXXI.

These cross-appals are taken from the decision of a statutory trustee judge of the United States District Court for the Eastern District of Missouri. The court denied in part and granted in part the discovery and nondiscovery relief that had been requested by the plaintiff. Missouri's allocation legislation was also rejected by the state's 77th General Assembly. The statute in question, known as House Bill 1987, S. Statute 1987, House Bill 1211, and later referred to as Bill 1211, was approved by the two legislative chambers on May 24, 1976. It imposed a flat rate of 10 percent on the value of quantities of Missouri mining land subject to program and development, regardless of whether the property was sold to the public or to a private buyer. It is not until 1981 that the age of 18 years is set as the minimum for workers in the mining industry. The statute is not retroactive, and it is not applicable to this operation. When the law passed in 1976, its effective date ending April 1, 1978, was 1978.

Appellants in No. 71-1517 (hereinafter referred to as appellants) are Plaintiff-Plaintiffs of United Missouri, a not-for-profit Missouri corporation, which operates facilities in Columbia, Missouri, for the performance of abortions; Dr. David G. High, who is a resident of Columbia and licensed as a physician in Missouri and who supervises abortions at the Planned Parenthood facility; and Dr. Michael Freeman, who is a resident of St. Louis and licensed as a physician in Missouri and who performs abortions at two St. Louis hospitals and at a clinic in that city. Three days after R-01211 became effective, appellants instituted this suit on their own behalf and on behalf of the class of Missouri-licensed physicians desiring to perform abortions and of the class consisting of those physicians' patients desiring the termination of pregnancy. Appellants sought to obtain enforcement of the statute of the ground that certain of its provisions deprive them and their parents of various constitutional rights: the right to privacy in the doctor-patient relationship; the physician's right to the free exercise of medical practice; the female patients' right to determine whether or to bear a child; the patient's right to live adversely affected by the risks inherent in childbirth or in medical procedures alternative to abortion; the physician-patients' right to give and their patients' right to receive safe and accurate information and treatment; the right to be free from cruel and unusual punishment under Ex. 13 Amendment, and Fourteenth Amendments of the Constitution of our process. The appellants in No. 71-1517 have since called the arguments which they made to support the Attorney General of Missouri and the Council Attorney of the city of St. Louis as representatives of the class of Missouri-licensed physicians.

The particular provisions of the statute that the appellants challenge are 12-2-2, stating that the following shall

§3.023, requiring from the woman prior to submitting to an abortion, a written statement stating that she consents to the procedure and that her consent is informed and truly given; it is not the result of coercion; §3.030, also requiring consent of the woman's spouse unless the abortion is certified by a licensed physician to be necessary in order to preserve the mother's life; §3.034, also requiring the written consent of one parent or person *in loco parentis* of the woman, if the woman is unmarried and under the age of 18 years, unless the abortion is certified by a licensed physician as necessary in order to preserve the mother's life; §3.035, requiring the physician to exercise professional care to preserve the life and health of the fetus and failing such, deeming the physician guilty of manslaughter and making him liable in an action for damages; §7, declaring an intent that nullifies an attempted abortion not performed to save the life or health of the mother an administrative within the state under jurisdiction of the juvenile court and depriving the mother, and also the father if he consented to the abortion, of parental rights; §9, prohibiting after the first 12 weeks of pregnancy the abortion method known as saline amniocentesis; and §§10 and 11, prescribing reporting and maintenance of record requirements for health facilities and for physicians who perform abortions.

After a hearing on the merits, the District Court ruled that the physician-petitioner is not standing to challenge the statutes as constitutionally defective, as §10 provides that an attorney for a person who fails to exercise the prescribed standard of professional care is liable for guilt of manslaughter; §14 provides that any person who performs or aids in the performance of an abortion contrary to the provisions of the act is liable guilty of a criminal offense; and that the proper standing of the physicians is not to demand of the court to determine whether the administrative clause had standing. On the second day of argument, the district

Various sections challenge the District Court's determination that all except § 6.12 violated the constitutional attack. Section 6.12 was held to be constitutionally inartificially since it imposed on the physician the duty to exercise in all stages of pregnancy "that degree of professional skill care and diligence to preserve the life and health of the fetus that would be required to preserve the life of any fetus intended to be born." Inasmuch as this failed to reach to the stage of pregnancy prior to viable, the provision was constitutionally overbroad. 1 F. Supp. 2d 975 (1973). The judge consented in part and dissented in part. *Id.*, at

Appellants appealed the District Court's failure to declare unconstitutional the statutes other challenged provisions. The appellants, in No. 74-1429, have taken an appeal from their part of the District Court's judgment holding § 6.12 unconstitutional and sustaining enforcement thereof.

# II

In *Roe v. Wade*, 410 U. S. 113 (1973), and in *Doe v. Bolton*, 410 U. S. 179 (1973), we undertook a detailed and thorough analysis of the constitutionality of state abortion statutes that proscribed abortion except where necessary to preserve the life or health of the mother. We were determined that the right of privacy, whether it be found in the Fourth or Ninth Amendment's concept of personal liberty and its application upon state action, as we find it is in § 1 of the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's choice whether to terminate her pregnancy. *Roe v. Wade*, 410 U. S. at 153. On the other hand, we recognize that at certain stages of pregnancy, create and important state interests in safeguarding potential health, and in protecting the sanctity and human life that become compelling. We held that the constitutionality of state regulation should be viewed at the stages of the pregnancy and in regard to the degree of

at 163, for the stage prior to approximately the end of the first trimester. The Court, in discussing its effect, again must be left to the medical judgment of the pregnant woman attending herself, *id.* at 164, without interference from the State. Thereafter, however, the State may, if it chooses, regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. *Id.* Finally, for the stage subsequent to viability at point we currently left viable and dependent (and developing medical ability), *id.* at 166, the State may establish regulations to protect the life of the fetus and may even proscribe abortion except where necessary, in appropriate medical judgment, to preserve the life or health of the mother, *id.* at 163-165.

We, of course, agree with the District Court that the physicians-appellants clearly have standing. *See, e.g., Roe v. Wade*, 410 U. S. at 188, and that, therefore, we need not reach the issues as to the standing of Planned Parenthood. *Id.* at 189. Our primary task, however, is to consider each of the challenged provisions of the new Missouri abortion statute in the light of our opinions in *Roe v. Wade*. We turn to this task.

1. Section 2(2) of the statute defines "viability" as "that stage of fetal development when the life of the unborn child may be sustained immediately outside the womb by natural or artificial means or supportive system." Appellants urge that this definition violates and conflicts with the "testimony" of viability in our opinion in *Roe*. In particular, appellants object to the failure of the definition to prepopulate and reflect the three stages of pregnancy rest to the issue of the word "immediately," and to the extra burden of regulation imposed by the District Court's opinion, *supra*, on a statute left to

<sup>1</sup> The Court in *Roe* also stated that the State's interest in potential life becomes increasingly weighty as pregnancy progresses and as the fetus becomes more developed. *Roe v. Wade*, 410 U. S. at 163-164.

tion of viability should be directed to a specific point in time, such as the end of the 24th week, or about the end of the second trimester.

In our discussion in *Roe*, we used the term "viable" to signify the point when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.*, at 160. We repeated that at this point "the fetus then presumably has the capability of meaningful life outside the mother's womb," *id.*, at 163, and we noted that this stage usually was reached at about seven months or 28 weeks but may occur earlier. *Id.*, at 160.

We agree with the District Court that the definition of viability in the new Missouri statute does not conflict with what we said in *Roe*. In fact, we believe that the statutory provision reflects an earnest attempt to comply with our observations and discussion relating to viability. We do not find it improper for the State to leave to the physician the determination as to whether the fetus is potentially able to survive outside the mother's womb, and thus we do not accept appellants' contention that a specific number of weeks must be fixed by statute as the point of viability. *Wolfe v. Schroering*, 388 F. Supp. 631, 637 (WD Ky. 1974); *Hodgson v. Anderson*, 378 F. Supp. 1008, 1016 (Minn. 1974), dismissed for want of jurisdiction *sub nom. Spinnous v. Hodgson*, 420 U. S. 903 (1975).<sup>2</sup> Moreover, we see no merit in appellants' objection that the definition of viability in the Missouri statute violates *Roe*'s "trimester differentiation test." In the current state of medical knowledge no fetus is viable at the end of the first trimester, see *Roe*, 410 U. S., at 160, and the point of viability itself separates two

<sup>2</sup> The Minnesota statute at issue in *Hodgson* provided that a fetus "shall be considered potentially 'viable'" midway through the gestation period or, in other words, at 20 weeks after conception. Noting that no evidence of viability at 20 weeks had been presented, the three-judge District Court there found the definition of viability unreasonable and unconstitutional. 378 F. Supp., at 1016.

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in the second stage of pregnancy that are not reasonably related to the protection of maternal health, those governments also let out without constitutional scrutiny. See *Hodgson v. Anderson*, 378 F. Supp. at 1047.

3. Section 14(3) requires the written consent of the spouse of the woman seeking an abortion at any stage of pregnancy, unless the abortion is certified by a licensed physician to be necessary in order to preserve the mother's life. Appellants contend that this provision, which obviously affords the husband the right to prevent an abortion, whether or not he is the father of the fetus, not only violates the rulings in *Roe* and *Doe*, but also conflicts with a variety of later Supreme Court cases. See, e.g., *Croft v. Croft*, 376 F. Supp. 676, 697 (D.C., S.D. Fla. 1973), appeal dismissed for want of jurisdiction and certiorari before denial denied, 417 U.S. 279 (1974); *Walter v. Schuering*, 388 F. Supp. at 636 (S.D. Ind. v. *Doe*, 386 F. Supp. 189, 191 (E.D. Cal. 1973); *Ch. D. v. Doe*, Mass., 314 N.E. 2d 128 (1974); *Doe v. South*, 278 S. 2d 329 (Fla. Ct. App. 1973), cert. denied, 415 U.S. 958 (1974).

4. *Roe* and *Doe* were specifically reserved decisions on the question whether a complete right of privacy for the father of the fetus, by the father and of the mother, or by a parent of a minor and a minor, newly constitutionally imposed. See *Roe v. Wade*, 410 U.S. at 165-67. We now hold that the State's constitutionally required consent of the father of an as specified, section 14(3) of the Missouri statute is a condition for abortion at any stage of pregnancy. We are in agreement with the dissenting Judge of this case as well as the courts whose decisions are cited as authority. State cannot delegate to a spouse a veto over the exercise of the state's authority to protect and totally protect non-exercised right to first trimester of pregnancy. 410 U.S. at 167. Clearly, since the state cannot regulate or prevent abortion during the first trimester, it cannot regulate, pre-

and his patient make that decision. The State cannot delegate authority to any particular person to restrict abortion during that same period. And the only restrictions that are permitted during the second stage of pregnancy are those that are reasonably related to protection of maternal health. *Id.* 374-75 (quoting *id.*).

We are not unaware of the deep and proper concern and interest that most Americans have in the pregnancy of their wives and in the development of the fetuses they carry. Neither has this Court failed to appreciate the importance of the marital relationship in our society. See, e.g., *Shogren v. Utaholman*, 406 U.S. 535, 541 (1962); *Mugford v. Holt*, 125 U.S. 150 (1888). Moreover, we recognize that the decision whether or not to undergo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, desirable and deleterious. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give to the husband the unilateral power to prohibit the wife from terminating her pregnancy, when the State itself lacks that right. See *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

It seems manifest that the decision to terminate a pregnancy should be one determined in by both the wife and her husband. No marriage can be viewed as harmonious or successful if the partners' interests are fundamentally divided or so seriously and socially assented. But the goal of promoting marital and trust in a marriage and of strengthening the marital relationship and the marriage relation is substantially advanced by giving the husband a veto over any possible, for any reason, whatsoever, or for none at all. Even if the State still loves the idea of delegating to the husband to protect it another, it still is not so. It is not that, like a, that such action would harm, as the husband would have to pursue it, the interest of the wife, a patient,

ing the centrality of a person's life to the meaning of the decision. . . . 5 F. Supp. 2d.

4. Section 3-4 requires the consent of one parent or person or two persons where the woman is unmarried and under 18 years of age. (less again, the abortion is certified by a licensed physician as necessary to preserve the life of the mother.) Appellants' challenge is provision on the ground that it permits the State to delegate to a parent with no way which the State itself does not have. That it violates the three-stage test of *Roe*, and that it, too, imposes an extra layer and burden of regulation. Moreover, the District Court's decision upholding this provision conflicts with rulings of other courts. *See, e.g., Gertson, supra; Wolfe v. Sommer, supra; Fox v. Froehne, 380 F. Supp. 947 (Cal. 1975); Lopez v. Bellotti, 381 F.2d 1011 (CA-1975); State v. Koonce, 81 Wash. 2d 1081, 530 P.2d 290 (1975).*

We agree with appellants and with the courts whose decisions are so cited that the State may not impose a blanket provision, such as that in § 3-4, requiring the consent of a parent or person or two persons as a condition for abortion of a non-pregnant woman. Just as with the requirement that we seek from the woman herself, the State does not have the authority to give a third party an absolute vote toward any the direction of the physician and his patient to terminate the patient's pregnancy, regardless of the stage of pregnancy, and regardless of the reason for wanting to abort.

We are going to put this case back with the Supreme Court for a final decision on the constitutionality of § 3-4. We are not going to say that the State has no authority to require the consent of a parent or person or two persons as a condition for abortion of a non-pregnant woman. We are only going to say that the State has no authority to require the consent of a parent or person or two persons as a condition for abortion of a non-pregnant woman in a way that is so broad and so absolute as to be a blanket provision. We are only going to say that the State has no authority to require the consent of a parent or person or two persons as a condition for abortion of a non-pregnant woman in a way that is so broad and so absolute as to be a blanket provision.

Constitutional rights do not necessarily begin with being when one attains full legal capacity. Minors, as well as adults, are protected by the Constitution. See, e.g., *Burdick v. Lopez*, 471 U.S. 149 (1975); *Goss v. Lopez*, 418 U.S. 565 (1975); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Levy v. Gussit*, 387 U.S. 1 (1967). The Court, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. *Pierce v. Massachusetts*, 321 U.S. 158, 170 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968). It requires, then, to examine whether there are any significant state interests in excluding abortion on the consent of a parent or person in loco parentis that are not present in the case of an adult.

One interest that is suggested is the safeguarding of the family unit and of parental authority. The District Court merely referred to this interest. . . . F. Supp. at . . . . It is, however, difficult to conclude that providing one parent the power to veto a determination made by the physician and the minor patient to terminate the patient's pregnancy will strengthen the family unit. Neither is it likely that this veto power will strengthen parental authority or control where the mother and the representing parent are fundamentally in conflict. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of property of the non-parent minor in time enough to have a second pregnancy.

We emphasize that in evaluating risks to us we can not suggest that every minor, regardless of age or maturity, may give effective consent to termination of her pregnancy. If a minor is incapable of giving a request consistent with the appropriate economic reality, whether parent

<sup>1</sup> It is not to be understood that we are suggesting that the minor, in the process of giving her consent, must be able to understand the economic consequences of her decision.

or procedure must be the one so taken. This is the usual rule for consent to medical treatment and procedure. It has been held that a state statute law authorizing mandatory treatment of the congenitally infected children does not violate the Due Process Clause of the 14th Amendment. *Rev. Stat. Mo. § 481.161* (1963). The majority in *Quinlan* holds that there is nothing different about medical procedures and that it requires no special consent procedure to be required for medical experimentation or for pregnancy at any stage, not even so if there is compelling justification for the restriction. It is provided, therefore, that it is without constitutional attack.

In section 2, paragraph 1, where a child is taken into custody from an attempted abduction, which was not permitted to occur by the custody of the mother. The statute then provides that the child shall be returned to the ward of the state, and that the mother and father lose all their parental rights in the abduction. "And there shall be no rights or obligations whatsoever relating to said child." Appointments under this law section, hearing parents of a parent's rights, and a due process of neglect without any hearing, and that it is unconstitutional, as expressed in *Shannon v. Texas*, 395 U.S. 361 (1969).

The state law ignores or violates the parents of any and all rights of parents with respect to the child and does not provide for any of an attorney to be heard before making the removal of a child of the State. The statute clearly violates the parents of their due process rights to a hearing before the state's appointment of them that they have abandoned their child or that they will be. *Shannon v. Texas*, *id.*, at 657-658. Since we determined in *Shannon* that all parents "are constitutionally entitled to be heard on their fitness before their children are removed from their custody," *id.*, at 658, to deny this right to certain parents under § 7 of the Missouri law is unconstitutional.

*Sachs*  
*Armstrong v.*  
*Mane*, 380  
U.S. 545  
(1965).





dine in ways that are closely related to maternal health.<sup>1</sup> 410 U.S. at 161. The question with respect to RU, therefore, is whether the prohibition of saline amniocentesis is a regulation which reasonably relates to the preservation and protection of maternal health. *Id.* at 163.

The District Court's majority determined on the basis of the evidence before it that the mortality rate in RU (if RU amniocentesis is used) exceeds the mortality rate in cases where RU amniocentesis is not used. Therefore the majority acknowledged, 39 marks, 1 couple is only if there were available safe and effective methods of measuring abortion after the first trimester. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100. Referring to safe methods as hysterotomy, hysterectomy, "mechanical means of inducing abortion," and prostaglandin, the majority concluded that at least the latter two techniques were safer than saline amniocentesis. Consequently, the majority concluded that the restriction on RU could be upheld as reasonably related to maternal health.

We feel that the majority's determination is conclusory and fails to appreciate the significant evidence. First, it did not recognize the availability of non-saline amniocentesis in this country. The majority's analysis of the data of all post first trimester abortions. Second, it did not recognize that there are severe complications to the availability of the saline amniocentesis technique which was not fully appreciated by the majority. Third, the majority's analysis of the data of all post first trimester abortions. Second, it is said that "the data of all post first trimester abortions" is "inconclusive." The majority's analysis of the data of all post first trimester abortions. Third, the majority's analysis of the data of all post first trimester abortions. Fourth, the majority's analysis of the data of all post first trimester abortions. Fifth, the majority's analysis of the data of all post first trimester abortions. 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of the same order, it is an equally different right. The state, through its, would protect the interests of the child which is the one most exposed to sexual exploitation after the first request of an adult's solicitation. The viewpoint of material mortality makes a contribution of the urgency until a same child could be brought to a regulation no longer appears to be reasonable, not for the protection of material health but rather as a regulation designed to inhibit the vast majority of patients after the first instance. As such, the regulation appears to be structurally sound. (See *Radio v. Secretary*, 388 F. Supp. at 687.)

Sections 10 and 11 establish strict bookkeeping requirements for health facilities and for advisory agencies in all phases of compliance. Under § 10 all such facilities and physicians are subject with fines "the appropriate measure of which shall be the preservation of material health and the belonging to the sum of medical knowledge through the compilation of relevant material health records and to monitor all activities performed to insure that they are done only in strict and in accordance with the provisions of the law.

The information collected in this is to be confidential and used only for statistical purposes. The means, however, may be inspected by the state or authorized public health officials. Under § 11 the records may be kept for seven years in the department files of the health facility where the information is collected.

Appellate courts are not reporting any recent sweeping changes in the regulatory system, nor are state and local governments reporting that they comply throughout with state and federal law. As the stages of the distribution of regulations are slowly being processed as statutory measures, it is expected that the implementation of the regulatory system will soon be completed. The state will be able to use the regulatory system to strengthen its control of the sex industry and to protect the public health.

We conclude that there are important conflicting interests attached to strict recordkeeping requirements. On the one hand, the importance of such records cannot only be helpful in developing information pertinent to the preservation of maternal health. On the other hand, as we carefully outlined in *Roe v. Wade*,<sup>11</sup> having too strict transfer of pregnancy by the state may impose an encroachment on regulations governing the medical judgment of the pregnant woman attending physician, to determine her pregnancy.<sup>12</sup> 410 U.S. at 163, 164. Furthermore, it is apparent that one reason for the recordkeeping requirement, by its terms, is that all abortions in Missouri are performed in accordance with R&B 1211, rules promulgated in view of our accreditation of the reasons requirements for abortion in the first trimester.

Recordkeeping and reporting requirements that are generally directed at the preservation of maternal health and that properly respect a patient's confidentiality and privacy interests after the first trimester of pregnancy.<sup>13</sup> This is so because after that stage, the State may enact substantive as well as recordkeeping regulations that are reasonable means of protecting maternal health. During the first trimester, however, when the State is not permitted to interfere with the relations between the physician and his patient as to the wisdom of terminating the patient's pregnancy, the State may impose no recordkeeping requirements that significantly differ from those of a State that similar medical procedures, such as the Missouri statute, applies the recordkeeping and reporting requirements for all abortions at all stages of pregnancy, we must conclude that these requirements are unconstitutional.

8. A quill case, No. 74-1119 from the Supreme Court, decided on 11/29/79, held that a law requiring

<sup>11</sup> 410 U.S. 113, 90 S.Ct. 1817, 36 L.Ed.2d 121 (1973).  
<sup>12</sup> We have also noted that the State's interest in the health of the mother is not implicated by the State's interest in the health of the fetus.  
<sup>13</sup> 410 U.S. at 163, 164.

Missing statute is so dramatically different that section provides

"No person who performs or induces an abortion shall fail to exercise the degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."

Any physician or assistant who fails to undertake such degree of care is guilty of manslaughter if the death of the child results, and is also liable in an action for damages. The District Court held that the physician was constitutionally coerced because it failed to exclude from its report the stage of pregnancy prior to viability. 17 F. Supp. 2d.

Appellors argue that the District Court's interpretation is erroneous and unnecessary. They argue that §10.10 establishes a general standard of care which applies only where a live born child results from an abortion. That is, a live born fetus is to be treated differently if it results from abortion than if it results from a normal birth. They contend that §10.10 should be read in its entirety to apply only after the abortion is complete and only in a live born child. Under this interpretation the standard of care established by §10.10 would be inapplicable to the physician performing the abortion.

We are inclined to agree with appellors' interpretation. The statute requires the physician to exercise the professional skill, care and diligence to preserve the life and health of the fetus without specifying that such care need be undertaken only after the stage of viability is attained. *Reed v. Bess*, 380 S.W.2d 333, 334 (Mo. 1964). As the court says in *Reed*, "the physician is required to exercise the professional skill, care and diligence to preserve the life and health of the fetus from the stage of pregnancy in which it is a live fetus, i.e., until it is delivered, and it is not that it is a live fetus only."

of § 611 refers to a child not readily viable—the physician fails “to take such measures to preserve or to sustain the life of the fetus . . . or the death of the child results . . . does not occur.” The only remedy in the provisions so far examined is the duty to progenitors that have reached the stage of viability. We thus agree with the District Court that § 611 is unconstitutional on its face for failing to limit the duty to preserve the life and health of the fetus to, at most, the stage of progenancy after viability.

### § 11

In view of the unconstitutionality of a number of the provisions of Bill 1211, the only question remaining is whether these provisions are severable from the rest of the statute, or whether the entire statute falls. Resolution of this question is influenced by § B of Bill 1211, declaring the provisions of the Act to be severable and stating that the invalidity of any provision does not affect the other provisions “which can be given effect without the invalid provision.”

It should be noted that not only the provisions specifically invalidated but also other statutes dependent on these provisions are null. Thus, for example, § 4 governing the construction payments of \$3 to a abortion performed after the first trimester, and § 8 requiring the woman to be warned that up to 50% of the resulting time of her business as a state of the state would not survive. To the extent that provisions remain that are independent from these constitutionally impermissible sections, as for example § 1, requiring that an abortion be performed only if a duly licensed and registered physician has given consent within a year to be performed by the seventh day of the . . . See *State v. Danforth*, 100 F.3d at 101. But in many cases the constitutionality of these other sections was not specifically held to be valid, so appears, we are to be instructed as regarding our final view of them.



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The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Mr. Justice Thomas took no part in the consideration or decision of these appeals.

## APPENDIX

### H. C. S. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the interests of the citizens and the public good of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion" the intentional destruction of the life of an embryo or fetus in, on or in mother's womb, or the intentional termination of the pregnancy of a mother with an intent in other than to prevent the probability of a live birth, or to remove a dead or dying unborn child.

(2) "Viability" that stage of fetal development when the life of the unborn child may be maintained, independently outside the womb by natural or artificial life-supportive systems.

(3) "Physician" any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed physician, exercising discretion in the service of his best clinical judgment, pregnant

2. After the woman prior to submitting to the abortion certifies in writing her consent to the abortion, and that her consent is free, voluntary and freely given and is not the result of coercion.

3. With the written consent of the woman's spouse, unless the abortion is performed by a licensed physician, to be necessary in order to preserve the life of the mother.

4. With the written consent of her agent or person in her place of the woman if the woman is incapacitated and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 4. No abortion performed subsequent to the life or health of the mother shall be performed unless except where the provisions of section 3 of this act are satisfied and in a hospital.

SECTION 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 6. (1) No person who performs or procures an abortion shall fail to exercise that degree of professional skill and care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child or of the health of the child or who shall fail to do so with or without negligence or culpable negligence shall be held in contempt of Section 3591b, RSMo. Further, such a physician or other person shall be liable in a civil action for damages as to each act, See, Ch. 359.080, RSMo.

2. Whoever who procures or procures shall, in addition,

of a pregnant woman in Massachusetts all be guilty of murder of the second degree.

(3) No person shall use any form or procedure of mutilated alive for any type of scientific research, laboratory or other kind of experimentation, either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such pregnant woman aborted and.

**SECTION 7.** In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, said infant shall be immediately ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred and the mother and father, if he consented to the abortion of such infant, shall have no parental rights or obligations whatsoever relating to said infant as if the parental rights had been terminated, pursuant to section 204B, RSMo. The attending physician shall forthwith certify said live born infant to the existence of such live born infant.

**SECTION 8.** Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician, and the woman shall certify in writing that she has been so informed.

**SECTION 9.** The general lawfully uses and the method of performing of abortion, in the same manner as when the abortion is performed with lawfully saline or other fluid is inserted into the uterus for the purpose of killing the fetus and obtaining it, the defendant is liable to incur a conviction and sentence, which is doubled after the first two weeks of pregnancy.

**SECTION 10.** Every child born alive in Missouri shall be supplied with the proper medical care, regardless of whether the child is born with or without the possibility of surviving or regaining health and of how long

to the gain of medical knowledge through the compilation of relevant medical health and life data to monitor all abortions performed to assure that they are done only under medical supervision and the strictures of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing or other health personnel who shall willfully and knowingly do or assist any application for license or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri received or refused by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and upon conviction shall be punished as provided by law.

SECTION 14. Any person who contravenes the provisions of this act knowingly performs or induces the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and upon conviction shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision 1 of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.



Conference 6-19-75

Court .....  
 Argued ....., 19...  
 Submitted ....., 19...

Voted on ....., 19...  
 Assigned ....., 19...  
 Announced ....., 19...

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MO.

vs.

DANFORTH

*Relist  
 until  
 Sept 29<sup>th</sup>*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	APP	G	D			
Rehnquist, J.				<del>XXXX</del>										
Powell, J.				<del>XXXX</del>										
Blackmun, J.				<del>XXXX</del>										
Marshall, J.				<del>XXXX</del>				<del>XXXX</del>						
White, J.				<del>XXXX</del>				<del>XXXX</del>						
Stewart, J.				<del>XXXX</del>				<del>XXXX</del>						
Brennan, J.				<del>XXXX</del>				<del>XXXX</del>						
Douglas, J.				<del>XXXX</del>				<del>XXXX</del>						
Burger, Ch. J.				<del>XXXX</del>				<del>XXXX</del>						

MEMORANDUM

TO: Justice Powell

FROM: Penny Clark

DATE: July 22, 1975

No. 74-1151 Planned Parenthood of Central Missouri v. Danforth  
No. 74-1419 Danforth v. Planned Parenthood of Central Missouri

This memorandum will summarize and expand on our discussion of June 18, 1975 on the issues in these appeals and Justice Blackmun's proposed disposition of them. The page numbers refer to the printed slip opinion circulated June 18. There are eight major issues:

(1) whether the state's definition of viability is valid despite its failure to mention the trimester division of Roe v. Wade;

(2) whether the woman may be required to execute a written consent;

(3) whether the state may require the husband's consent;

(4) whether the state may require the consent of one parent of an unmarried woman under the age of 18;

(5) whether the state may terminate, without a hearing, the parental rights of parents who have consented to an abortion if the fetus is delivered alive;

(6) whether the state may prohibit the use of saline induction as an abortion method in the second and third trimesters of pregnancy;

(7) whether the state may require physicians and health facilities to keep records of abortion procedures;

(8) whether the state may punish as manslaughter a physician's failure to exercise professional skill to preserve the life of a fetus.

(1) Definition of Viability. Justice Blackmun's Danforth opinion is clearly correct in concluding that a state may define viability in terms of potential for life outside the womb, rather than by strict adherence to the trimester scheme. The capacity for independent life was the primary concern of Roe v. Wade; the trimester scheme was simply a method for estimating viability.

(2) The Woman's Consent. Insofar as this requirement applies to the first trimester, Justice Blackmun's opinion declares it invalid as an impermissible burden on the woman's decision to obtain an abortion. In its application to the second trimester, it is invalid because it is unrelated to the state's valid interest in maternal health. The opinion apparently considers the requirement a valid regulation of third-trimester abortions.

This opinion appears to announce a general rule that the states may not impose on first-trimester abortions any regulation that is not applicable to similar medical procedures. P. 7; see also p. 16. This approach seems to be supported by Roe v. Wade, in that Roe held that regulation of abortions must

be justified by a "compelling state interest." 410 U.S. at 163-165. It held that ~~there~~ only two state interests qualified (the health of the mother, and the potential life of the fetus), and that neither of these interests was compelling in the first trimester. 410 U.S., at 170-171. If this analysis is applied literally, it leaves no room for any regulation of first-trimester abortions except to the extent that the state regulates other medical procedures. General, nondiscriminatory regulations such as sanitation rules imposed on all medical facilities may be allowed under the state's general interest in health, since there is no likelihood that the state is using them as a surreptitious method of preventing or discouraging abortions. (This analysis has very little relation to the compelling-state-interest analysis of Roe v. Wade; it bears more similarity to First Amendment doctrine allowing nondiscriminatory regulation of the time, place and manner of speech, which cannot itself be regulated.)

If this analysis is followed, Justice Blackmun's Danforth opinion seems correct even though, as you and I agreed, the consent requirement imposes no discernible burden on a woman's decision to obtain an abortion because any reputable doctor would assure that she freely consents to the procedure.

It may be possible, nonetheless, to interpret Roe v. Wade to forbid only state regulations that prohibit abortions, unduly restrict their availability, or burden the woman's decision to

obtain an abortion. In Roe v. Wade the only reason given for forbidding all regulation of first-trimester abortions is that first-trimester abortion procedures may be safer than childbirth. To conclude from this fact that the state has no compelling interest in regulating first-trimester abortions disregards the state's interest in assuring that first-trimester abortions actually are performed in a manner that is safer than childbirth. If they are done carelessly, or under unsanitary conditions, they can be very dangerous. Justice Blackmun's answer to this, I am sure, would be that the state entrusts all other medical procedures - including many that are far more dangerous than early abortions - to the professional judgment and competence of physicians. Nevertheless, the history of abortion in this country may provide some justification for additional regulation of abortions in the interest of health and safety. Those regulations might include licensing of facilities (including either clinics or properly equipped doctors' offices) as long as those regulations do not burden the woman's decision or unduly restrict the availability of abortions. If you wish to pursue this possibility, you may find some support in Justice Stewart's concurring opinion. 410 U.S. at 170-171.

The state's interest in obtaining a written consent from the woman seems a different matter. It is not related to a concern for maternal health. Instead it seems intended to encourage deliberation over the decision to have an abortion,



although its efficacy for that purpose is questionable. If the Court adheres to the apparent rule of Roe v. Wade that a compelling state interest is required for any regulation of abortions, the consent requirement may be invalid despite the absence of any discernible burden.

(3) The Husband's Consent. This is a troublesome issue, and Justice Blackmun's opinion does not mention the most difficult aspect of it: the husband's right of procreation.

As I read Roe v. Wade, it is grounded on recognition of a fundamental right of procreation, or, expressed more narrowly, a right to make personal decisions regarding procreation without interference by the state. See 410 U.S. at 152-154. If the woman has a fundamental right to bear children or not to bear children, as she chooses, without interference, it seems that a man's right to father children should be recognized equally. The state then may assert an interest in protecting the man's right by making his wife obtain his consent before she may abort his child. But such a consent requirement clearly infringes the woman's right to choose whether she will bear a child.

The answer to this apparent dilemma may be the concept of state action. Although Roe v. Wade recognizes a fundamental right relating to procreation, it only prohibits state interference with that right. If a state forbids a woman to obtain an abortion without her husband's consent, it would interfere



with the woman's right as defined in Roe. If, on the other hand, it imposes no restriction on the woman's access to abortions and simply leaves the husband's right unprotected, it has not interfered with either party's right of self-determination in matters of procreation. When the rights of the two spouses pose an actual conflict, neutrality may be the state's only option.

(4). The Parents' Consent. This section requires the consent of one parent or person in loco parentis if the pregnant woman is unmarried and under the age of 18, unless the abortion is necessary to save her life. Justice Blackmun's Danforth opinion invalidates this requirement on the ground that the state cannot delegate to a third party the power to forbid a woman to have an abortion. The parents' interest in supervising their daughter, though recognized by this Court, is no stronger than the pregnant minor's right to terminate her pregnancy, if she is competent to make the decision herself. Up to this point I agree. But I am confused by the following discussion of the minor who is not competent to decide whether her pregnancy should be terminated. The opinion says that if the minor is incapable of giving informed consent to an abortion, a parent or guardian "must be the decisionmaker." The support for this is a statement that this "is the usual rule for consent to any other similar medical procedure." P. 12. Still, the opinion invalidates the consent requirement because it treats

abortion differently from other medical procedures and because there is no "compelling justification" for restricting a minor's access to abortions at any stage of pregnancy.

From this discussion, I cannot tell what the rule of law is. Can a parent consent to an abortion for a minor daughter who is incapable of making the decision herself, if the daughter objects? If the minor wants an abortion but is not competent to make the decision herself, can the state block the abortion unless one of her parents consents? Can it do so only if a similar rule applies to other surgery? Who decides whether the minor is competent to make the decision? Can the state define competency by drawing an age line? Can that age line be eighteen?

The problem of the incompetent minor obviously is not solved by this opinion. It may be possible to avoid the question on this appeal, since this is a facial attack and the statutory provision applies to all minors up to the age of 18. Many individuals within that age span are surely mature enough to weigh intelligently the choice between bearing a child and having an abortion. The present statutory provision could be invalidated on the ground that it is not tailored for incompetent minors, with a suggestion that the state may make appropriate provisions for the problem, if it is careful. The object of such legislation must be to protect minors who are incapable of giving informed consent, without unduly restricting

those who are mature enough to make the decision themselves. One solution (which may have to come through the legislative process) may be to involve the doctor in the decisionmaking: for instance, if a parent and the doctor agree that the minor cannot give informed consent, perhaps then the state could require one parent's consent. I am inclined to think it would be best to avoid requiring a judicial proceeding to determine competency, both because delay increases the danger of the abortion procedure and because I am generally wary of creating new constitutional hearing requirements. Nonetheless, if a state wanted to set up a judicial hearing procedure, it might be a reasonable solution.

5. Termination of Parental Rights. Section 7 provides that if the fetus is delivered alive in an abortion that was not performed to save the life or health of the mother, the parental rights of the mother - and of the father if he consented to the abortion - shall be terminated. Justice Blackmun's opinion construes this section to provide no hearing before parental rights are terminated, even though Missouri law requires a hearing before parental rights may be terminated in any other situation.

If this construction is correct, the opinion rightly invalidates it under due process principles. If any other parent who "abandons" a child is entitled to a hearing, the "abandonment" represented by an abortion should also require a

hearing. There are factual issues to be tried, including the statutory question whether the abortion was performed to save the mother's life and health. Moreover, if the parent contests the proceeding in hope of keeping the child, it is hard to justify terminating parental rights without an inquiry into fitness.

(6) Use of Saline Induction. Section 9 prohibits use of this abortion technique in either the second or third trimesters. Saline induction, or saline amniocentesis, is an abortion method used almost exclusively in the latter stages of pregnancy because safer methods are available in the first 20 weeks. The procedure consists of withdrawing some of the amniotic fluid and replacing it with a salt solution. The salt solution kills the fetus and induces labor within a matter of hours. The method is safer for the mother than hysterotomy and hysterectomy - the other abortion methods widely available in late pregnancy - but perhaps not as safe as the yet-experimental method of prostaglandin instillation. Hysterotomy and hysterectomy require major abdominal surgery, but there is a significant likelihood of delivering the fetus alive. Hysterectomy terminates the woman's childbearing ability. Hysterotomy requires an incision into the womb; later pregnancies then require caesarean delivery.

Because Roe v. Wade recognizes the state's compelling interest in protecting the life of the fetus after viability,

the ban on saline abortions must be analyzed separately for the second and third trimesters. As for the second trimester<sup>(the period before viability)</sup>, where Roe recognizes only the state's interest in maternal health as compelling, this restriction cannot be sustained. If saline abortions are safer than other available methods, the state's interest in maternal health cannot justify their prohibition. As to the third trimester, however, the matter is more complex. Roe said that the proper balance between the state and individual interests in the third trimester would allow the state to forbid all abortions unless necessary for the life or health of the mother. The opinion did not address the question of a proper balance if the only issue is the method of performing the abortion rather than the availability of the abortion vel non. Thus the issue as to the third trimester, not recognized in the current Danforth opinion, is whether the state's interest in protecting viable fetuses from destruction will justify prohibiting saline abortions even if abortion is necessary to save the life or health of the mother, and other available abortion methods are significantly more dangerous to the mother. If the abortion is being performed to save the mother's life or health, the health risk of hysterotomy or hysterectomy may be as grave as bearing the fetus to term.

(7) Recordkeeping Requirements. Section 10 provides that health facilities and physicians shall be required to maintain records, as prescribed by the state department of health,



of all abortions. It specifies two purposes: "the preservation of maternal health and life by adding to the sum of medical knowledge" and "to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of law." The statute does not say what information must be kept, but it does provide that the information obtained from a patient shall be confidential "and shall be used only for statistical purposes" but some records (perhaps only the reports the physicians compile from the patients' records) "may be inspected and health data acquired by local, state, or national public health officers."

Justice Blackmun's opinion finds this provision invalid because it imposes recordkeeping requirements that are not applicable to other similar medical procedures. This conclusion ignores the state's legitimate interest in enforcing the regulation that Roe v. Wade and Doe v. Bolton permit. Without such a recordkeeping requirement, it may be impossible to enforce the <sup>Missouri</sup> provision prohibiting abortions after viability unless necessary to preserve the life or health of the mother, § 5, or the provision requiring second-trimester abortions to be performed in a hospital, § 4 (not challenged in this suit). As long as proper safeguards are provided to ensure confidentiality of the medical records, so that a woman's decision to have an abortion is not burdened by knowledge that her medical records would be made public, I think limited recordkeeping requirements may be permitted under Roe and Doe.



(8). Requiring efforts to preserve fetus. Section 6

of the Missouri statute requires a physician to "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." Justice Blackmun's Danforth opinion construes this section to apply to abortions performed before viability and declares it "overbroad."

This result is unwarranted. The natural way to read this section, it seems to me, is to apply it only to abortions that might deliver a live fetus - that is, abortions performed after viability. Such abortions are prohibited by § 5 of the statute unless necessary to preserve the life or health of the mother. Roe v. Wade allows this restriction, and its recognition of the state's interest in preserving viable fetuses also would seem to support legislation requiring a doctor to attempt to save the life of a viable fetus following <sup>such an</sup> abortion.

This section may have some relation to the saline induction issue: if it were construed to affect the choice of a method for performing the abortion after viability, some provision should be made for the safety of the mother. But if, as the state contends, it applies only after the abortion is completed and affects only the physician's method of handling the delivered fetus, it seems perfectly valid. It seems to me that the proper way to handle this issue is to say that this

section may not apply to abortions performed before viability, but that it is valid as applied to post-viability abortions as long as it ~~is~~ <sup>is construed to</sup> not ~~restrict~~ <sup>restrict</sup> the availability of abortions necessary for the life or health of the mother. The doctrine of overbreadth, under which a statute is declared facially invalid because some of its possible applications are impermissible, has no application here.

If this section is also challenged on grounds that it defines criminal responsibility in a manner that is too vague for doctors to conform their conduct, it will raise a different issue and require different treatment.

to such family member's coverage, also provide that the health insurance benefits applicable for children shall be payable with respect to a newly born child of the insured or subscriber from the moment of birth.

SECTION 2. The coverage for newly born children shall consist of coverage of injury or sickness including the necessary care and treatment of medically diagnosed congenital defects and birth abnormalities.

SECTION 3. If payment of a specific premium or subscription fee is required to provide coverage for a child, the policy or contract may require that notification of the birth of a newly born child and payment of the required premium or fees must be furnished to the insurer or nonprofit service or indemnity corporation within 31 days after the date of birth in order to have the coverage continue beyond such 31 day period.

SECTION 4. The requirements of this act shall apply to all insurance policies and subscriber contracts delivered or issued for delivery in this state more than 120 days after the effective date of the act.

Approved June 12, 1974.

Effective 90 days after adjournment.

## APPENDIX

~~[ACT 76]~~

### ~~ABORTION—REGULATIONS—PENALTIES~~

#### H.C.S. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion", the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Viability", that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) "Physician", any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.



(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

SECTION 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 637.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

SECTION 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

SECTION 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

SECTION 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

SECTION 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seven years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.

MEMORANDUM

TO: Mr. Justice Powell

DATE: September 1, 1975

FROM: Phil Jordan

No. 74-1151 Planned Parenthood v. Danforth  
No. 74-1419 Danforth v. Planned Parenthood

On August 18, 1975, CA5 (Tuttle, Godbold, Morgan) decided Poe v. Gerstein, an appeal from a declaratory judgment entered by a 3-judge court. CA5 agreed with the 3-judge court that parental and spousal consent requirements violated a minor's right to an abortion. An outline of CA5's reasoning follows.

I. Parental Consent.

A. After reviewing this Court's decisions involving minors' rights under the Constitution, CA5 stated that

it is possible that either: (1) all fundamental rights apply to minors, but the state may sometimes assert an interest sufficient to justify the state action; or (2) minors do not necessarily have all of the fundamental rights of adults.

CA5 refused to decide which was correct, and looked instead "to the nature of the right itself to determine its availability to minors." It interpreted Roe as having found a right to an abortion because of the harm that could result to the woman if the right were denied. See Roe, at 153. Foreseeing equal if not greater harm to the minor if the right were denied, CA5 held that the minor had the same right to an abortion as the adult.



B. CA5 interpreted this Court's recent decisions as requiring that a statute be "necessary" to achieve a compelling state interest before it can overcome a fundamental right.

C. CA5 considered the asserted state interests:

(1) preventing illicit sexual conduct among minors - CA5 found that the parental consent requirement was not "necessary" to achievement of that interest; and that, in any event, it would not significantly affect illicit sexual conduct among minors.

(2) protecting minors from their own improvidence - CA5 found that the statute was "not drawn with sufficient particularity to express only the state interests at stake." Reasons: parental decision-making does not necessarily improve the quality of the abortion decision; parents may not act always in the minors' best interests;

the physician can counsel the minor who has not already made up her mind about an abortion before consulting him.

(3) fostering parental control - CA5 was concerned that this interest could justify a parent's denying an abortion for reasons other than the minor's best interests. The court also noted that allowing the parent to block an abortion, after the minor has become pregnant and sought an abortion against parental wishes, seems like locking the barn after the horse is gone.

(4) supporting the family as a social unit - CA5 decided that the parental consent requirement could not

restore the unit's viability once it has been fractured by the minor's pregnancy. Moreover, the court decided that the privacy of the family as a unit rested on the First Amendment (association), and was protected against state intrusion; it could best be preserved by keeping the state out entirely, and allowing parent and child to work out the abortion problem on their own. N

## II. Spousal Consent.

A. The state claimed it was supportable as part of the state's "general authority to regulate the marriage relationship." CA5 found that the state's general interest in the marriage relationship (as evidenced by marriage and divorce laws) simply did not extend so far as to justify interference with decisions relating to childbearing.

B. The state claimed it was protecting two interests of the husband;

(1) interest in the fetus - CA5 noted that the common law had recognized no paternal interest in the fetus, but that modern law had recognized more and more paternal interest in the child (e.g., Stanley v. Illinois). But CA5 pointed out that this statute based the husband's veto power on the fact of marriage to the woman, rather than parentage of the fetus; therefore, the statute could not be justified by the modern recognition of paternal interest. Moreover, the father's interest in the fetus,

which is not as strong as his interest in a child with which he has established a parent-child relationship, was "simply too attenuated to strip the woman of her fundamental right to privacy."

(2) Interest in the procreative potential of the marriage - CA5 stated that procreation was a fundamental right, citing Skinner. The state argued that it had the power to protect that right. CA5 reasoned that Skinner protected the procreative right against state interference only. Therefore, the man's procreative right could not justify infringement of the woman's right to privacy. Moreover, the man could protect his procreative right by divorcing the woman and marrying another childbearer.

P.J.

ss

Phil

Conference 9-29-75

*Court* .....  
*Argued* ..... 19...  
*Submitted* ..... 19...

Voted on....., 19...  
Assigned ..... , 19...  
Announced ..... , 19...

No. 74-1151

# PLANNED PARENTHOOD OF CENTRAL MISSOURI

vs.

DANFORTH

We agreed  
last June to  
note. Blackman  
~~to~~ circulated  
a memo. in June

Note  
+  
Consolidate  
for Argument

[illegible]



Conference 9-29-75

Court .....  
Argued ....., 19...  
Submitted ....., 19...

*Voted on*....., 19...  
*Assigned* ..... , 19...  
*Announced* ..... , 19...

No. 74-1419

DANFORTH

vij.

PLANNED PARENTHOOD OF CENTRAL MISSOURI

Note  
+  
Cousdale  
with 74-1151

[illegible]

March 22, 1976

No. 74-1151 Planned Parenthood v. Danforth  
No. 74-1419 Danforth v. Planned Parenthood

I summarize below my preargument views with respect to principal provisions of the Missouri statute. This memo is intended as a tabulation, rather than an exposition of reasons.

1. Definition of Viability (§ 2(2))

*Invalid - vague.*

Conforms to Roe's definition, but I view this as too vague and indefinite. I would elaborate on Roe, requiring a state to specify a definite period.

The Roe definition defines a viable fetus as "one potentially able to live outside the mother's womb, albeit with artificial aid". The opinion noted that viability is never earlier than 24 weeks but is usually placed at about 28 weeks. (Roughly end of second trimester).

As a doctor may be prosecuted for manslaughter if he aborts a viable fetus, the Roe definition is unworkable and will discourage doctors from performing abortions near the end of the second trimester. A statute should specify an exact number of weeks, e.g., 22 or 24.

Note: HAB would sustain the Missouri definition, apparently without change.



II. Requirement of Woman's Consent In Writing and Record Keeping Requirements [§§ 3(2), 10 and 11] *OK*

These burden no constitutional right and should be sustained. They protect the interests of the doctor, and also compel the woman to consider her decision maturely.

The fact that consent is not required for other surgical procedures is not necessarily controlling. The state may require consent and record keeping on a step-by-step basis.

Note: HAB would strike these provisions down. I disagree.

III. Consent of Spouse [§ 3(3)] *Invalid*

This is an invalid burden on the woman's personal right. "Marital bliss" will suffer whether or not consent is required. Perhaps divorce laws should specific that the Husband would be entitled to a divorce.

Note: HAB says this is invalid. I agree.

IV. Parental Consent [§ 3(4)] *Invalid as written (cf. Mar. Law)*

Missouri law requires consent of a parent where "mother" is a minor.

As the section is now written, I will probably say it is invalid. But a minor's "consent" should be knowingly made, and many prospective mothers are too young (age 12-15, for example) to make this sort of decision alone. Best to

*accords with common law rule of "knowing consent" to surgery (battery)*

leave to a doctor. ~~✗~~ If he concludes the minor is mature enough, this is adequate. If he concludes otherwise, he will wish to obtain parental consent to avoid common law tort liability for committing a "battery" on an infant. *or go to Court*

Note: HAB thinks invalid. I am inclined to agree with him, in its present form.

V. Termination of Parental Rights where Child Survives Abortion [ § 7 ]

If, as HAB reads statute, there is a permanent termination of parental rights without a hearing, this section is invalid. But the DC read the section somewhat differently, holding that the statute terminates parental rights only temporarily to assure that the child receives emergency medical care as needed. The DC thinks the parents can seek a hearing and regain custody. If DC reading of statute is correct, I could approve § 7. *OK if statute means what DC says*

VI. Prohibition of Saline Induction [ § 9 ]

*Invalid*

HAB thinks this section is a veiled attempt "to inhibit the vast majority of abortions after the first trimester". He notes that about 75% of all abortions after the first trimester are accomplished by saline induction.

I agree that proscription of saline in the second trimester is invalid. But this is a complex issue as to abortions during the third trimester (post viability),

*\* I'm no longer convinced of this  
— after argument + Cfr. discussion*

when Roe holds that the state then may proscribe abortions altogether except where necessary to preserve the life of the mother. As saline kills the fetus, the question arises as to whether this abortion method is lawful in all situations with respect to post viability.

I need to do some further thinking here.

VII. Requiring Efforts by Physician to Preserve Fetus [§ 6]

Both the district court and HAB think this provision invalid, as it appears to require a physician to try to save the life of a fetus even during the process of a pre-viability abortion. If this reading is correct, § 6 is absurd on its face. The Missouri AG says the section does not apply to the abortion procedure at all, but only in the event a live infant results from the abortion. The AG argues, in effect, that the provision merely requires a doctor to preserve a live fetus - baby - once it is outside of the mother's womb. If the statute can be read in this way, it would be reasonable.

OK  
or  
construed

L.F.P., Jr.

74-1151 PLANNED PARENTHOOD v. DANFORTH  
74-1419 DANFORTH v. PLANNED PARENTHOOD

Argued 3/23/76



## Surman (Patr.)

Attacker definition of viability  
- there should be a conclusive presumption that viability does not occur prior to 24 wks.

Patient's consent - physicians have obligations to obtain informed consent. Statute is not directed to whether consent is informed.

§ 3.3 Consent of Spouse - left open in Roe.  
30% of abortions are for married women. Statute doesn't require that ~~spouse~~ husband be father of child. Also husband may not be living with wife.

§ 3.4 Parental consent\* - minors may be treated w/o parental consent for all other medical problems: e.g. for V.D., other problems related to pregnancy, etc.  
(If minor is not capable of giving informed consent, physician must go to parents, to a guardian or court.

---

Danforth (AG of Mo) Persuasive argument

Emphasized right of legislature  
to regulate the ~~sex~~ marital  
relation - in various respects  
and actions of minors.

Consent of parent required when  
a minor marries.

Right to vote is fundamental  
- but is denied until 18.

Consent of parents to marriage  
required - under 18. (otherwise void).

Saline is not a first trimester  
measure - 9+ is primarily a second  
trimester. There are safer  
methods ("prostaglandin")\*

Susman (cont).

Distinguishes "voting" & "marriage"  
(conceded to be fundamental rights) as  
imposing only temporary restraint, whereas  
abortion right ~~must~~ must be exercised  
at time - or too late.

---

\* Approved by Fed Drug Admin 1974.



Planned Research  
74-1151 + 1419

my date in 74-1151  
X 74-1419

Count - OK  
of marks

Spencer Count - X

Patent Count - X

Duty of Doctor - OK

continued on AG reports  
(over child outside of  
womb). Others worked.

Termination of Patent Rts

OK only continued.

Saline X

Research - OK

Met  
at  
conference  
of 3/25

Planned Parenthood Cases  
74-1151 & 1419

File

My vote in § 74-1151  
Viability - X § 74-1419

Consent - OK  
of Mother

Spouse's Consent - X

Parental Consent - X

Duty of Doctor - OK if  
construed as AG suggests  
(once child outside of  
womb). Otherwise invalid.

Termination of Parental Rts  
OK <sup>only</sup> as construed.

Saline X

Record Keeping - OK |

My  
vote  
at  
Conference  
of 8/25

## Viability

C9 - Statute OK

---

Brennan - Agrees with Harry on all issues

~~C10~~

Stewart - Consent by mother, ~~E~~  
Record keeping, & viability  
are OK. All other provisions  
bad.

White - Affirms across Board

Marshall - Agrees with Harry on  
all issues.

Blackmun - See my separate notes

Powell - See my notes

Rubinstein - Affirms 74-1151  
Reverses 74-1489

Stevens - Viability - OK

Mother's Consent - OK

Spousal " - Invalid

Parental " - OK

§ 6 - OK, <sup>has</sup> ~~is~~ construed ~~to~~ AG

Wave of State - Invalid unless

Salvo - OK <sup>construed on AG's say.</sup>

Record Keeping - OK



Consent of mother

CZ - Statute OK

## Consent of Spouse

C.G. Invalid  
This statute had in several respects



Parental Consent (one only)

Cif. - Invalid  
(No means of prod. Rev.)

## Duty of Physician (§ 6)

C § - OK if construed to apply  
only after end of period  
of viability.

## Blackmun's Comments (made at length)

Written Consent - { close Q. - go either way.  
But leans vs validity.  
Standard is whether consent is informed.  
There is an area in which Mo could  
properly legislate

Spouse's Consent - Invalid

Parent's Consent - Invalid

~~State~~ Ward of State - Invalid  
(Stanley controls)

(§ 9) Saline - Invalid

Record Keeping - could go either way.

§ 6 Duty of Doctor - Invalid

(This was invalidated by  
D.C. - & Mo asked review  
in X-Petition. Thus, we  
affirm if we agree with D.C.)



## Viability

Roe's def. - "potentially  
able to live outside  
womb" (never earlier  
than 24 weeks - 1 to 28 weeks)

## Doctor's vulnerability

- homicide

Jury determines  
viability.

word-for-vagueness it  
imposed in criminal prosecution.

Still leave problem  
at beginning of term -  
but this is more readily  
determinable. Doctor's  
judgment more likely to  
be accepted.

BENCH MEMO

TO: Mr. Justice Powell

DATE: August 19, 1975

FROM: Phil Jordan

No. 74-1151 Planned Parenthood v. Danforth  
No. 74-1419 Danforth v. Planned Parenthood

This memorandum will summarize my initial thoughts on each of the issues raised by this appeal. My current thinking results from my study of the district court opinion, Justice Blackmun's proposed per curiam opinion, Penny Clark's memorandum of July 22, and most of the periodical literature on Roe and Doe and on the precise issues involved in this appeal. My opinions may change after reading whatever briefs are filed in the fall.

I. Definition of Viability [§ 2(2)].

*Adopt Roe's vague definition. There should be a definite period.*

The district court, HAB, and Penny all agree that this section complies with the definition of viability in Roe, and is therefore valid. It does indeed comply with Roe, but inquiry cannot stop there. Given the controlling importance of the point of viability to the permissible regulatory framework it set up, the Roe opinion's definition of viability is its weakest and potentially its most dangerous component. This appeal gives the Court an opportunity to modify the definition, or at least to require that it be made more precise by state legislatures.

*Opportunity to clarify definition of viability*



The problem with the Roe definition is its "flexibility." HAB defined a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid," 410 U.S. at 160. Although he noted that viability is usually placed at 28 weeks and (apparently) never earlier than 24 weeks, see id., he did not define viability in terms of weeks for purpose of the permissible regulatory scheme. Instead, he demarcated the period in which the state can prohibit nontherapeutic abortions from the period in which it cannot by nothing more definite than the general notion of "viability" - a potential for independent life. ?

This is fine in theory but unworkable in practice. It must be remembered that "viability" determines the point at which the state can impose criminal penalties- perhaps even apply its homicide laws<sup>1</sup> - to doctors who perform nontherapeutic abortions and to women who seek them. Roe effectively makes that point a jury question. The question of viability will arise in the context of a criminal prosecution brought by the state against a doctor who has performed a nontherapeutic abortion. The state will claim that the fetus was viable and the doctor will defend that it was not, and the decision will be left to the jury. Such difficult issues are often left to a jury guided by expert testimony, of course, but not - so far as I am aware - in the context of a criminal prosecution.

In fact, I submit that had the Court initially been faced with the Roe definition of viability in the context of an

appeal from a homicide conviction of a doctor who had aborted an approximately 24-week-old fetus, In a criminal case the Court would have declared the definition void-for-vagueness. There would have been no way for that doctor to have known, at the time he decided to abort the fetus, that he was committing a criminal act; the act did not become criminal until the jury, on the basis of undoubtedly conflicting expert testimony, more or less "second-guessed" the doctor on the viability of that particular fetus.

As a further illustration of the problem, consider the case in which a doctor aborts a 22-week-old fetus for nontherapeutic reasons and the state prosecutes him. Roe indicated that current medical knowledge places the earliest point for viability at 24 weeks. But suppose the judge at the doctor's trial decides to allow the state to try to prove that this fetus was viable at 22 weeks - perhaps because some researcher somewhere had quite recently discovered a way to keep a 22-week-old fetus alive outside the womb by new artificial means. Assume the jury, presented with testimony of this revolutionary new technique (which may be available, of course, only in South Africa or West Germany, and certainly not wherever the abortion occurred), convicts the doctor of performing an illegal abortion or even of homicide (see footnote 1). Could this Court reverse on the ground that the question of viability of a less-than-24-week-old fetus should not have gone to the jury? What if the doctor had never heard of the new technique for sustaining life in the 22-week-old fetus - should that matter? Under Roe, I think

the answer to both questions is no. The reason is the same in both instances - the flexible nature of the "viability" definition in Roe, which implicitly contemplated that the point of viability could move farther back toward conception as advancing medical knowledge increases our ability to sustain life in ever younger fetuses. As I read Roe, it requires neither that the technique for sustaining fetal life be widely available before the point of viability can be moved closer to conception, nor that the technique be available to the doctor performing the abortion before he can be said to have aborted a "viable" fetus. Indeed, such requirements would make no sense under Roe, since the question there was framed in terms of when fetuses, in the abstract, can be considered viable. Development of a technique for sustaining fetal life after 22 weeks would seem to make all 22-week-old fetuses potentially viable - if a jury could be persuaded to say so.

There are several more illustrations of the problem but only one need be mentioned. Suppose one doctor is tried for the abortion of a 26-week-old fetus and wins acquittal by convincing the jury that the fetus was not viable. Another doctor might then abort a 25-week-old fetus in reliance on the first jury verdict, only to be tried and convicted of an illegal abortion by a different jury. In other words, under Roe's definition the potential liability of doctors could never be pegged down - no matter how many doctors won acquittal after abortions of 24-to 28-week fetuses, the next doctor who



aborted one would run the risk that the prosecutor might convince his jury that the fetus was viable.

*9 would*  
The practical effect of the Roe definition is obvious. A doctor will soon stop aborting (except for therapeutic reasons) any fetus that is anywhere close to the currently publicized minimum age of viability, for fear that he will be prosecuted successfully by a prosecutor who can convince a jury of the viability of that fetus, or who can dig up previously unpublicized information of new techniques of sustaining slightly younger fetuses outside the womb.<sup>2</sup>

*4  
States should be allowed to set a precise time & manner of determining it.*  
The problem with the Roe definition can be avoided without repudiating Roe itself. Nothing in Roe would appear to prevent the Court's holding that a state must define viability in terms of fetal age within the currently accepted parameters of 24 to 28 weeks. In other words, the state would have some leeway in determining when to begin punishing nontherapeutic abortions, but it would have to set a precise point around which doctors and women could plan their behavior - as with other areas of criminal law.

The precise point which a state sets (e.g., 26 weeks) would still leave the problem of determining exactly where *you* a woman was in her term at the time of an abortion (e.g., was she in the 25th or 26th week). It is my untutored understanding, however, that the point in term can be determined with some precision - perhaps with as little margin of error as a few days. There would probably be less disagreement among experts

over that issue than over the question of viability. Moreover, determination of point in term of a particular woman is much more likely to be considered the province of the single physician who examines her than is the question of viability of an aborted fetus. Finally, with the focus on the woman and the stage of her pregnancy rather than upon the fetus and its potential for life, any trial that did occur would be less likely to get sidetracked onto emotionally charged issues - and therefore, I believe, less likely to result in conviction of the doctor because of the jurors' understandable reverence for "life."

I see no theoretical problem with holding that the state legislature must define viability in terms of weeks of pregnancy. Roe really says no more than that the <sup>limits</sup> ~~parameters~~ of viability, on the present state of medical knowledge, are 24 and 28 weeks. Given this range of expert opinion, it seems perfectly reasonable for a state to peg viability at some point along that spectrum. The reason to require it to do so is the problem set out above - to permit it not to results in a terrible vagueness problem that prevents women and doctors from ordering their behavior according to the dictates of the criminal law.

Most likely, states would tend to set viability at the minimum age possible - apparently 24 weeks. There is nothing wrong with that, since if each of several choices is reasonable the decision between them is normally a legislative one. And



states probably would also tend to lower the minimum age of viability with each advance of life-sustaining technology. On Roe's own terms, that also would be permissible. (If the reduction in age of viability became too great, say by the discovery of some incredibly complicated means of sustaining out-of-womb life after the twelfth week (end of first trimester), the Court could modify the underlying definition of viability to require a capability of sustaining out-of-womb life by "reasonable or widely available" artificial means.)

II. Requirement of Woman's Written Consent, and Record-Keeping Requirements [ §§ 3(2), 10 & 11 ].

*I disagree with HAB*

*OK - no burden on Const. right*

<sup>①</sup> The district court upheld both the woman's consent and <sup>②</sup> the record-keeping requirements. HAB would strike both down. Penny seems to agree with HAB on the woman's consent requirement, but to think that the record-keeping requirements are permissible. I believe both requirements are permissible.

*so do I*

Penny's memorandum identifies the basic problem in approaching these two requirements. It is a question of how Roe and Doe should be interpreted: did those cases say only that a state cannot impermissibly burden the woman's decision to have an abortion, or did they announce a rule that a state cannot place any requirements on the abortion decision or procedure - even those that do not actually "burden" - unless the same requirements are placed on all medical decisions and procedures of similar scope and danger? HAB's proposed opinion in this appeal clearly indicates that he favors the latter rule. See pages 7 & n. 3, 16 & n. 6.

I strongly believe that the rule favored by HAB is indefensible. The rule is twice flawed. First, it effectively sets up the woman's right to a first trimester abortion as an absolute in which the state has no interest whatsoever. It is certainly possible to read Roe and Doe to support such a position, see, e.g., 410 U.S. at 163,<sup>but</sup> it is an unnecessarily restrictive and analytically unsound position which should be repudiated in this appeal. The HAB position assumes (1) that because the state has no compelling interest in the first-trimester abortion decision it necessarily has no interest at all, and (2) that a simple state interest, as opposed to a compelling one, would not justify any state regulation of the first-trimester abortion decision or procedure, anyway.

The truth is that the state could have lots of interests in the first-trimester abortion, and that its interests could justify any regulations so long as they do not burden the abortion decision. One must remember the basic analytical framework of Roe: the woman's fundamental right of privacy gives her the right to an abortion, and that right can be overcome only by a compelling state interest (in maternal health or fetal potential for life). In other words, the state in furtherance of a compelling interest may regulate abortions in ways that make them less available or more difficult to obtain when available (see examples of second trimester regulations in Roe, 410 U.S. at 163), or may even prohibit abortions altogether (e.g., post viability) except in certain

narrowly defined instances (protection of maternal life or health). But this says absolutely nothing about what the state may do in the furtherance of other, noncompelling interests, so long as it does not burden the abortion decision or procedure. Why could not the state require just about anything - so long as it has some legitimate interest within its broad police powers and its requirement does not encroach in any way upon the woman's fundamental right to the abortion? Traditional jurisprudence would seem to require as much.

The second flaw in the HAB approach is that it denies the state the right to regulate in piecemeal fashion. HAB would require that a state regulate all medical procedures of comparable danger and scope, or regulate none at all. So long as no protected interests are burdened by a regulation and the state can show some legitimate interest behind it, I know of no precedent for striking the regulation simply because the state has chosen not to regulate a comparable area in the same fashion.

Thus, the only defensible reasons for invalidating the written consent and the record-keeping requirements are (1) that they further no legitimate state interests, and (2) that they burden the abortion decision or procedure.<sup>3</sup> The written consent requirement would seem to meet the state's concern that its citizens undergo only those medical procedures to which they intelligently consent. I do not see how it burdens the abortion decision at all, unless one wishes to argue that there is a right to an abortion on a whim. (The Court's care in Roe



in pointing out that the decision ultimately would be made in conjunction with the physician, along with its Doe statement that it did not sanction abortion on demand, show that whim has no place in the decision and that it should be knowingly and intelligently made.) As to the record-keeping requirements, the state asserts two interests (furtherance of medical knowledge, and assurance of compliance with law) that seem unexceptionable. There is definitely a possibility for burdening the abortion decision, however, if women should think that such records could become public. Assuming stringent safeguards of the records' confidentiality, I see no reason to invalidate the requirements.

### III. Spousal Consent Requirement § 3(3)

The district court upheld this requirement. HAB would strike it down, and Penny leans toward agreement. I believe it must fall.

The starting point for analysis must be Roe's establishment of the right to an abortion as a component of the woman's right of privacy. Since the woman in Roe was unmarried, the case does not foreclose an argument that in the context of a pregnancy within a marriage the right to an abortion should be shared by husband and wife. Phrased differently, it could be argued that the right of privacy underlying the right to an abortion protects the marriage relationship, and that no one party to the marriage can partake of its protection alone.

*Invalid burden on  
woman's personal  
right. Husband  
should be entitled to  
divorce.*

*Yes, but*

Support for such a position may be found, conceivably, in Griswold v. Connecticut, 381 U.S. 479 (1965). I believe, however, that Griswold should be read as protecting the intimacy of the marital bedroom only - while it would certainly protect the couple during the copulation that leads to conception, it has nothing to say about the later decision to abort. Instead of Griswold, I believe the true antecedent to Roe to have been Eisenstadt v. Baird, 405 U.S. 438 (1972), where the Court stated that the right of privacy (at least with respect to intimate decisions) was individual. Given Eisenstadt and the focus in Roe itself upon the reasons for protecting the woman's abortion decision, there is no room to argue that the husband derives any right to participate in the abortion decision from the same constitutional source as does the woman.

Most arguments in favor of a spousal consent requirement rely upon asserted state interests. Since a spousal consent requirement certainly contemplates the overriding of a woman's power to make the abortion decision in consultation only with her physician, Roe requires that any state interest furthered by the requirement be compelling. The district court found that the state's interest in the harmony of the marriage relationship was compelling. I may or may not agree on that point, but in any event the state's position is self-contradictory. The only way it could argue that the spousal consent requirement furthers marital harmony would be to argue that a woman's

DC found  
state's  
interest  
in harmony  
of marital  
relationships  
- but  
this  
cuts both  
ways.



*Husband's interests  
of constitutional magnitude  
(e.g. to procreate) are  
protected only vs. state action.* 12.

procuring an abortion without her husband's consent would cause disharmony. In other words, to have one spouse (the wife) assert her will over that of the other (the husband) causes disharmony. But that is exactly what the spousal consent requirement contemplates as well - the only difference being that the husband would assert his will over the wife's. So the spousal consent requirement cannot further the state interest on which it is sought to be justified. *Trudeau*

*What  
do  
sterilization  
cases  
say?*

The husband, of course, can assert lots of valid interests, most importantly his interest in procreation. The problem is that none of his interests - including the right of procreation - has ever been held to be a constitutionally protected interest, either within the right of privacy or otherwise. Even if his interests were of constitutional magnitude, they would be protected only against state action, and the decision of his wife to have an abortion is private action. Given a constitutional right of procreation, the husband would have to argue that the constitution's grant of a negative right (to be free of state action impinging on his decision to procreate) carries with it a power in the state affirmatively to protect the man's procreative desires against nullification by private parties. So far as I know that would be unprecedented.

There can be no denying, of course, that a husband has valid interests at stake in the abortion decision. His basic right as a human being to procreate, his parental expectations, his inchoate rights and duties of custody over the potential

quite  
 child - all of these and more are/real and should be afforded  
 some protection. Unfortunately, I do not see any way to  
 protect those interests beyond the protection already given  
 them by the laws of domestic relations. A decision by a  
 woman to abort a pregnancy over her husband's objection  
 signals, pretty clearly, that the marriage may not be an  
 enduring one. In such a situation, the husband - or the wife -  
 should be able to secure a divorce on grounds of irreconcilable  
 differences or even mental cruelty.

yes /  
 IV. Parental Consent Requirement § 3(4)  
*for minors.*

The district court upheld this requirement on the basis *A "consent" must be knowingly made. Some minors are not mature enough to make consent knowingly.*  
 of the state's interest in "the authority of the family *leave decision to doctor whether parental consent is necessary*  
 relationship." HAB would strike it down on the ground that  
 the minor has a constitutional right of privacy which is not  
 overcome by any asserted state interests. Penny basically  
 agrees with HAB, but HAB's discussion of the "incompetent minor"  
 troubles her. I believe that there can be no clear-cut resolution  
 in favor of or against the minor in every instance; the issue  
 is most subtle.

The first question has to be whether the minor's  
 constitutional right of privacy is equal to that of the adult  
 woman. Justice Blackmun waffles a bit on the issue, see page 11,  
 but I read him to say that the minor's right is the same.  
 Presumably he derives this postulate from the Court's decisions  
 in Breed v. Jones, Goss v. Lopez, Tinker v. Des Moines School

District, and In re Gault, all of which he cites. Even if those cases indicate that the specific rights involved in them accrue to minors in equal measure with adults, that would not dictate a similar holding in this case. There is a crucial difference between the rights of due process (Goss and Gault) and freedom from double jeopardy (Breed) on the one hand, and the right of privacy in the abortion context on the other. The difference is that the right of privacy in the present context, <sup>4</sup> unlike the rights in those other cases, <sup>4</sup> protects a decision, and a decision by definition connotes an intelligent and understanding decision-maker. There can be no constitutional interest in protecting a "decision" that is made by someone - be she minor or insane adult - who does not understand the meaning and consequences of her actions. <sup>5</sup> Thus, the Constitution should protect an abortion decision made by a minor who understands what she is doing, but not a "decision" by one who does not.

Obviously, Roe presumes that an adult woman's abortion decision is knowing and therefore worthy of constitutional protection. The situation is entirely different with a minor: no presumption should arise that any given minor<sup>6</sup> does or does not understand the procedure and the consequences of an abortion. The problem is to devise some way to protect the right of the knowledgeable minor to make the abortion decision without parental interference, while at the same time providing for parental control of the decision in the case of an unknowledgeable minor.



It would be possible to distinguish between knowledgeable and unknowledgeable minors by means of some "hearing" or other similar procedure before the abortion. The flaw in that solution is that it undercuts one of the real values in allowing the knowledgeable minor to make her own decision - it would destroy the confidentiality of the decision, and could even bring the minor into open conflict with her parents. Such a procedure would also consume precious time and result in the abortion being more dangerous to the minor than it would have been had she been able to procure it when she first sought it. Finally, fear of exposing her condition in such a proceeding could lead the minor to seek an illegal and unsafe abortion - thus undercutting one of the real values of legalized abortions, their relative safety.

These problems with any pre-abortion administrative or judicial determination of the minor's decision-making competence convince me that some other way must be found to protect the knowledgeable minor. I believe that method is to consider the abortion as just another medical procedure, and to treat it exactly as others are treated where minors are involved.

It is my understanding, from the literature, that no state has a statute requiring parental consent before medical treatment of a minor. Parental consent is generally sought by a doctor, however, because of the common law of torts.

*No consent  
required  
as to  
other  
medical  
treatment -*

*but common  
law of torts  
applies!*

Do cases  
support this  
all the way?  
16.

?

In tort law, any unconsented touching - even medical treatment - is a battery. And a minor is deemed incapable of giving consent. A doctor must procure parental consent, therefore, in order to avoid liability for battery.

The common law recognizes three situations in which a doctor need not procure parental consent: (1) if an emergency situation requires immediate treatment of the minor; (2) if the minor is "emancipated" as that term is defined in the law; (3) if the minor is "mature," meaning he or she understands the nature and consequences of the treatment and is capable of giving informed consent. The last exception is a recent addition to the law, and not recognized by all jurisdictions. Note that this last exception coincides precisely with the requisite for a minor's having constitutional protection for her abortion decision. If she understands the decision, she should have constitutional protection; and if she understands the decision, recently developed tort law allows the doctor to give treatment without parental consent.

This coincidence provides the means of protecting the knowledgeable minor's abortion right without undercutting the values of confidentiality, speed, and safety that are furthered by the right itself. Simply treat the abortion like any other medical treatment. A doctor requested by a minor to perform an abortion would have to make a judgment on whether or not the minor is "mature" enough to understand the procedure and its consequences. If he decides in the affirmative he



can perform the abortion; if he decides in the negative he will not do so because of his potential tort liability. No one besides the girl and the doctor is involved before the decision to abort is made, so there is no loss of confidentiality nor any delay, and the girl is unlikely to seek a backroom abortion (unless, of course, she is turned down by the doctor as too immature - hopefully in that case he would contact her parents). The question of whether the doctor was correct in his judgment of the girl's maturity would arise later, if the parents learn of the abortion and bring a battery suit against him. But that is possible with any other medical treatment of minors as well.

This theory needs fine-tuning, but I see no immediate reason why it would not work. A few points should be noted: First, it places the decision of whether or not a minor is to enjoy a constitutional right in the hands of the physician. There is really nothing wrong with that, however, since the physician decides not the extent of any constitutional right, but only the existence of the requisite to its enjoyment (i.e., sufficient maturity to make talk of a "decision" meaningful). Second, the approach does require striking the parental consent provision in this case, since that provision would permit a parent to override the abortion decision of a minor even though the doctor deems the girl capable of understanding the decision. Third, I have not allowed for any "compelling state interest" that might support the parent's

overriding the decision of a mature minor, for I simply cannot conceive of one. The district court found one in the state's interest in "parental authority within the family." I would not accept that as a compelling interest even in the abstract, where a mature minor is concerned. Moreover, virtually every state (according to the literature) has some sort of legislation allowing minors to seek medical treatment in other sex-related areas (e.g., V.D. treatment, contraceptives); that indicates to me a general recognition that "parental authority" must take a back seat in this area to the realities of teenage sexual behavior.

V. Termination of Parental Rights § 7.

*where child survives abortion*

*If, as HAB, reads statute, there is a permanent termination w/o hearing, it is invalid.*

The district court upheld this provision. HAB and Penny both want to strike it down because it provides no hearing prior to terminating parental rights. I agree with HAB and Penny if their reading of the Missouri statute is correct. Their reading, however, differs from that of the district court, and this bothers me.

*But DC reads it differently*

HAB and Penny read the statute as cutting off parental rights peremptorily and absolutely with no opportunity for the parents to regain custody. The district court, on the other hand, reads the statute as cutting off such rights only temporarily, for purposes of insuring that the child can receive any emergency medical care that might be necessary. According to the district court, the parents can seek a hearing on

their fitness in order to regain custody of the child. See Jurisdictional Statement in No. 74-1151, at A-15, A-16.

I currently believe the reading by Penny and HAB is correct. If the district court's reading should prove on reflection to be the correct one, however, I believe the provision could stand. As the district court noted, the concern at the moment of birth must be for the infant. Drastic measures almost surely would be necessary to keep the infant alive or to prevent permanent damage. The parents may not be in a proper psychological state at that point to have the child's best interests at heart - after all, they had just sought to abort the child. In this situation, it may be justifiable to put the responsibility for the child's welfare in the state, with a right in the parents to regain custody at a later date.

#### VI. Prohibition of Saline Induction [§ 9]

The district court upheld this provision as reasonably related to maternal health, on the ground that there are safer methods of abortion. HAB would strike the provision on the ground that it is not a reasonable regulation in the interest of maternal health, but is instead a veiled attempt "to inhibit the vast majority of abortions after the first trimester." See page 15. In reaching this conclusion, HAB noted that saline induction was currently used in about 75% of all abortions after the first trimester, that one of the safer

*Used in  
75% of  
1st trimester*



methods suggested by the district is of limited availability, and that it was anomalous to proscribe saline but not various other abortion techniques that are even more dangerous to the woman. Penny divides her consideration of the regulation into two parts. As to the second trimester, she agrees with HAB that the regulation is invalid as a protection of maternal health because it leaves unproscribed even more dangerous methods. As to the period after viability there is the additional complexity added by the state's interest in the fetus: since saline apparently kills the fetus, can the state prohibit its use in order to protect the potential life represented by the fetus?

Although I am bothered a bit by the underlying approach, which amounts to questioning legislative motives, I am inclined to agree with HAB and Penny that the proscription of saline in the second trimester cannot stand. Two points strike me as particularly significant: (1) as the district court noted, Jurisdictional Statement in No. 74-1151 at A-18, the mortality rate in childbirth is greater than that with the saline method of abortion, and (2) saline is widely available and widely used, while the safer alternative method emphasized by the district court is quite rarely used due to physicians' lack of familiarity with it. The first point undermines any assertion by the state that the proscription of saline is for the protection of maternal health. The second point suggests quite strongly that the legislature knowingly used the

proscription of saline as an indirect method of restricting the availability of abortions.

In the post-viability period, the issue is quite tricky.

I quote the crucial lines from Roe:

State regulation protective of fetal life after viability . . . has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

*after  
viability*

410 U.S. at 163-164. I read that passage to mean that in a crunch, where only the fetus or the mother could live, the state would have to allow an abortion even if the fetus was sure to die. But that says nothing about balancing the interests when the question is sure fetal death versus an increased risk of the mother's death: is the state's interest in the viable fetus sufficient for it to require the mother to take a greater risk in order to avoid certain death for the fetus? Roe does say that the State cannot prohibit an abortion if the mother's health is at stake, and that can be read to support the position that the state cannot force the mother to undergo a greater risk for the sake of the fetus. Yet, Roe does not say, squarely, that the fetus can be killed for the sake of the mother's health, but only that it can be aborted. Does "abortion" always connote birthing a dead fetus, or in the context of a viable fetus does it simply mean premature (and perhaps live) birth? If the former, perhaps Roe has already struck the balance against Missouri's



proscription of saline by stating that a woman must be allowed to abort if necessary for her health - allowing her to "abort" would necessarily mean that she could intend to kill the fetus. If "abort" in the context of a viable fetus means no more than premature birth, however, the state should be able to proscribe any abortion technique that would kill the fetus.

The complexity does not stop there. Perhaps Roe contemplated two kinds of post-viability "abortions". In the first kind, the mother's physical health or her life would be threatened by the pregnancy itself. In this case the mother's interests could be met by allowing her to give birth immediately (instead of carrying the fetus to term, where its chance of survival would be greater.) But it would not be necessary, in order to preserve her health or her life, that the "abortion" purposefully be aimed at killing the fetus. Should not the state be able to proscribe the saline method in order to protect the fetus?

The second kind of post-viability "abortion" would be one in which the woman's mental health would be endangered by her bearing a child - she would be likely to crack under the strain of raising a baby. In this case the death of the fetus would

be necessary to protect her health. Should she not be able to choose saline in order to insure that the viable fetus dies?

VII. Requiring Efforts by Physician to Preserve Fetus [§ 6]

Both the district court and HAB strike this provision on the ground that its first sentence requires a physician to try to preserve the life of a fetus even during the process of a previability abortion. Penny argues that the sentence should be construed to apply only to post-viability abortions, and should be upheld so long as it does not restrict unduly the availability of abortions necessary for the life or health of the mother.

The Missouri attorney general argues that the sentence does not apply to the abortion procedure at all, but only in the event a live infant should result from the abortion. Considering the rest of § 6, his reading of the first sentence seems plausible, perhaps even correct. All the sentence would require under his reading is that a doctor not kill a fetus/baby once it is outside the mother's body, even if he had not intended that it be born alive. This would certainly avoid some serious problems that arise if the sentence is read to require efforts to preserve the fetus' life during the abortion procedure.

Mo A.G.'s  
reading

The first problem with reading the sentence to apply to the abortion procedure is that the sentence becomes absolutely meaningless in the context of a pre-viability abortion. Since

a nonviable fetus, by definition, will die when removed from the uterus, what possible logic could require the doctor to take steps to preserve its "life" during the abortion? The second problem stems from the mushy definition of viability contained in the Missouri statute (see, Part I, above). If the § 6(1) standard of care applies during a post-viability abortion procedure but not during a previability one, a doctor who aborts a fetus anywhere between 24 and 28 weeks will be subject to a manslaughter prosecution should the fetus be stillborn. (The prosecutor could argue that the fetus was viable, and that a viable fetus would not have died if the doctor had exercised the required standard of care.) Finally, and as Penny noted in her memo, the § 6(1) standard of care (if applicable to the abortion procedure) interacts with the § 9 proscription of saline induction. Even without § 9 in the statute, § 6 probably would prohibit the use of saline after viability because of its fatal effect on the fetus. The validity of that prohibition would depend on the same factors identified in the discussion of § 9 as applied to the post-viability period, Part VI supra.

We are handicapped in trying to interpret § 6(1) by the absence of any state court construction of the section. But the attorney general in his jurisdictional statement, at 8-9, argues that the legislative history of § 6(1) supports his reading of it. It is to be hoped that full briefing on this section will produce convincing evidence that his reading is indeed correct.

P.J.

### FOOTNOTES

1. The Roe opinion, of course, did not say that a viable fetus was a person, but only that it had the capacity for life outside the womb. This suggests that the state may be able to punish criminally a doctor who performs an abortion on a viable fetus, but that it may not try him for homicide. This is because homicide traditionally connotes the killing of a living person, not the aborting of a "chance for life." But an argument can certainly be made that HAB's definition of viability - capacity for life outside the womb - must have assumed that the viable fetus is "alive" inside the womb (else it would have to "spring to life" suddenly upon removal from the womb, and that makes no sense). If the fetus is alive, albeit inside another person's body, then killing it before it emerges from the womb should be homicide.

HAB's discussion of the legal status of the unborn, 410 U.S. at 161-162, implies that he would not consider a post-viability abortion to be a homicide. I submit that his position may be inconsistent with his own definition of viability, for the reason set forth in the preceding paragraph.

2. It may be possible, theoretically, to avert liability of these doctors on the ground that they lacked mens rea. The theory would be that the doctor, in the exercise of his own medical judgment, considered the particular fetus not to be viable, or was unaware of the new technique that makes possible sustainment of life in fetuses younger than heretofore thought feasible. Thus, he did not intend to abort a



viable fetus. The practical problem with this escape hatch is that the question of mens rea must be judged by the jury just like any other fact question, and the prosecutor would be free to argue - and convince the jury - that the doctor did realize that the fetus was viable. The inhibitory effect on doctors remains the same.

3. Actually, the correct question should be whether the requirements place too much of a burden on the abortion decision or procedure. This is because state interests and individual constitutional rights are normally balanced when they clash, rather than one winning out entirely. Roe and Doe were written in absolutes, however (viz. especially the last trimester, where the state's interest in fetal life wins out entirely over the woman's right of privacy, except when the woman's health is involved - and that wins out entirely over the state's interest). I know that it would be asking too much for the Court, after Roe and Doe, to accommodate a state's noncompelling interest and the woman's right to an abortion, so I am content to inquire into whether the requirements burden the abortion decision at all.

4. Tinker v. Des Moines School District gives me some trouble in this analysis, because the right involved there - freedom of expression - seems also to assume understanding and knowledge on the part of the person exercising it. If you accept my analysis of the nature of the right to an abortion, we must work at distinguishing Tinker or interpreting it in a



way consistent with my analysis. We could start, perhaps, with your citation in your Goss dissent, 43 U.S.L.W. at 4189, of Justice Stewart's Tinker concurrence, 393 U.S. at 515, in which he stated that the First Amendment rights of children are not "coextensive with those of adults."

5. I recognize a problem with characterizing the right to an abortion as a right to make a decision. The characterization suggests that the state could simply prohibit abortions by those persons (incompetents and unknowledgeable minors) who are incapable of making intelligent decisions, since those persons would have no constitutional interest to be infringed by such a prohibition. To meet his problem, I would argue that the person's constitutional right is not, necessarily, the right to make the abortion decision herself, but to have the decision made in her best interests. A competent, knowledgeable woman can make that decision herself. In the case of the incompetent, someone who is presumed to have her best interests in mind can make it. But the state cannot dictate that the decision be made one way or the other. (As will become clear from the text, this refinement does not disturb my proposed resolution of the parent's-consent issue. In the case of the immature minor, the decision will be made by the person presumed to have her best interests in mind - the parent.)

Paula POE et al., and all others similarly situated, Plaintiffs-Appellees,

v.

Richard E. GERSTEIN, etc., et al., etc., Defendants-Appellants.

No. 74-2745.

United States Court of Appeals,  
Fifth Circuit

Aug. 18, 1975

Action was brought challenging provisions of Florida abortion statute generally requiring written consent of husband if pregnant woman was married and requiring written consent of parent, custodian or legal guardian if pregnant woman was under 18 years of age and unmarried. A three-judge United States District Court for the Southern District of Florida, at Miami, David W. Dyer, Circuit Judge, and William O. Mehrkens and Joe Eaton, JJ., granted declaratory relief, and the state appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that the fundamental right to an abortion applies to minors as well as to adults, and that both the parental and spousal consent requirements were unconstitutional.

Affirmed.

#### 1. Abortion ¶1

The fundamental right to an abortion applies to minors as well as adults. U.S.C.A.Const. Amendments, 1, 14.

#### 2. Constitutional Law ¶82

Where fundamental rights are involved, regulations limiting those rights may be justified only by a compelling state interest, and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

#### 3. Abortion ¶¶1

Portion of Florida abortion statute requiring consent of parent, custodian or legal guardian if pregnant woman is under 18 years of age and unmarried could not be justified by state interests in preventing illicit sexual conduct among minors, protecting minors from their own imprudence, fostering parental control, and supporting the family as a social unit, and thus such consent requirement was unconstitutional. West's F.S.A. §§ 381.382, 458.22(3), 744.13, 827.06; U.S.C.A.Const. Amendments, 1, 14.

#### 4. Abortion ¶1

Fundamental right to abortion could not be abridged on the basis of compelling state interests, where, inter alia, the statute in question was not "necessary" to achievement of such interests or was unlikely to achieve them. West's F.S.A. § 458.22(3).

#### 5. Constitutional Law ¶82

Privacy of the family is constitutionally protected by First Amendment associational values, which exist not merely to protect parental authority, but also to preserve the intimacy and autonomy of the family relationship from state intrusion. U.S.C.A.Const. Amend. 1.

#### 6. Abortion ¶1

State's societal interest in marriage relationship was not sufficiently "compelling" to justify Florida statute precluding abortion without the written consent of husband if pregnant woman was married, unless husband was voluntarily living apart from his wife. West's F.S.A. § 458.22(3).

#### 7. Abortion ¶1

Florida statute precluding abortion without consent of husband if pregnant woman was married and husband was

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INDEXED

*I believe I am in  
accord with the result reached  
as to all issues except  
definition of viability (IX A-p 8)  
- which I need to consider  
more carefully.*

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 74-1151 AND 74-1419

*L7P*  
To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 5/26/76

Recirculated: \_\_\_\_\_

*Record keeping  
& Consent  
of Mother  
are  
approved.*

Planned Parenthood of Cen-  
tral Missouri et al.,  
Appellants  
74-1151 v.  
John C. Danforth, Attorney  
General of the State of  
Missouri, et al.  
John C. Danforth, Attorney  
General of the State of  
Missouri Appellant  
74-1419 v.  
Planned Parenthood of Cen-  
tral Missouri et al.

On Appeals from the  
United States District  
Court for the Eastern  
District of Missouri.

[June —, 1976]

MR. JUSTICE BLACKMUN delivered the opinion of the  
Court.

This case is a logical and anticipated corollary to the  
decisions in *Roe v. Wade*, 410 U. S. 113 (1973), and *Doe*  
*v. Bolton*, 410 U. S. 179 (1973), for it raises issues sec-  
ondary to those that were then before the Court. In-  
deed, some of the questions now presented were forecast  
and reserved in *Roe* and *Doe* 410 U. S., at 165 n. 67.

After the decisions in *Roe* and *Doe*, this Court re-  
manded for reconsideration a pending Missouri federal  
case in which the State's then existing abortion legisla-  
tion, Mo. Rev Stat §§ 559.100, 542.380, and 563.300

*Reviewed  
L7P  
5/26/76*

PLANNED PARENTHOOD OPINION

PLANNED PARENTHOOD OF MISSOURI, et al. DANKFORTH

Child), was under constitutional challenge. *Rodgers v. Danforth*, 410 U. S. 449 (1973). A three-judge federal court for the Western District of Missouri in an interlocutory decision thereafter declared the challenged Missouri statutes unconstitutional and granted immediate relief. On appeal here, that judgment was summarily affirmed. *Dankforth v. Rodgers*, 434 U. S. 1065 (1973).

In June 1974, somewhat more than a year after *Roe* and *Doe* had been decided, Missouri's 77th General Assembly, in its Sixtyrd Regular Session, enacted House Committee Substitute for House Bill No. 1211 (hereinafter referred to as the "Act"). The legislation was approved by the Governor on June 14, 1974, and became effective immediately by reason of an emergency clause contained in § 5 of the statute. The Act is set forth in 1-3, as the Appendix to this opinion. It imposes a structure for the control and regulation of abortions in Missouri during all stages of pregnancy.

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Three days after the Act became effective, the present litigation was instituted in the United States District Court for the Eastern District of Missouri. The plaintiffs are Planned Parenthood For Greater Missouri, a not-for-profit Missouri corporation which maintains facilities in Columbia, Mo., for the performance of abortions; David Hall, M. D., and Michael Freeman, M. D. Doctor Hall is a resident of Columbia, is licensed as a physician in Missouri, is chairman of the Department and Professor of Obstetrics and Gynecology at the University of Missouri, M. D. School at Columbia, and supervises physicians at the Planned Parenthood facility. He was named by the three-judge court in the 1973 case as one of four physicians who were licensed Missouri licensees in obstetrics and gynecologists. No. 73-426

DECLARATION OF CONSENT

PLANNED PARENTHOOD OF MISSOURI, INC. (FOURTEEN)

*In re: the ex. Rodriguez Jans' Statement A7.* Doctor Fleming is a resident of St. Louis, is licensed as a physician in Missouri, is an instructor of Clinical Obstetrics and Gynecology at Washington University Medical School, and performs abortions at two St. Louis hospitals and at a clinic in that city.

The real defendants are the Attorney General of Missouri and the Circuit Attorney of the city of St. Louis, in his representative capacity, and (as the representative of the class of all similar Prosecuting Attorneys of the various counties of the State of Missouri) Complaint 129.

The plaintiffs brought the action on their own behalf and on behalf of the entire class consisting of duly licensed physicians and surgeons presently performing or desiring to perform the termination of pregnancies and the health of the entire class consisting of their patients desiring the termination of pregnancy, all within the State of Missouri. *Id.* at 9. Plaintiffs sought declaratory relief and also sought to enjoin enforcement of the Act on the ground, among others, that enforcement of the Act deprives them and their patients of various constitutional rights: "the right to privacy in the personal and confidential relationship"; the physician's "right to practice medicine according to the highest standards of medical science"; the female patients' "right to exercise their freedom of choice"; the patients' "right to be free from the health risk involved in child-birth"; the patients' "right to have an alternative to abortion"; the physicians' "right to give and plaintiffs' patients' right to receive medical advice and treatment pertaining to the decision of whether to carry a pregnancy to term or to have an abortion or other method of termination"; the patients' right to enter the Right to Life Amendment to the Missouri Constitution without being coerced into being coerced into



#### 4. PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

coercing them to bear and/or pregnancy they conceive . . . and by being placed in the position of decision making faced with . . . inherent possibilities of bias and conflict of interest . . . the physician's right to due process of law guaranteed by the Fourteenth Amendment . . . [is] at issue."

The particular provisions of the Act that remained under specific challenge at the end of trial were §2 (2) defining the term "viability"; §3 (2) requiring from the woman prior to attempting to abort during the first 12 weeks of pregnancy a certification in writing that she consents to the procedure and "that her consent is informed and freely given and is not the result of coercion"; §3 (3) requiring, for the same period, "the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother"; §3 (4) requiring, for the same period, "the written consent of one parent or parent-in-law parents of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother"; §6 (1) requiring the physician "to exercise professional care" to preserve the life and health of the fetus, and finding such physician not guilty of manslaughter and making him liable in a civil action for damages; §7 declaring an intent to abort is an attempted abort in which was not performed to save the life or health of the mother; to be an "unlawful act" of the state under the jurisdiction of the juvenile court; and depriving the mother and also the father if he consented to the abortion of certain rights; §8 the alleged violation that neither of abortion known as such a "unlawfulness" is delinquent or "interferes" with and "prohibiting that neither, after the first 12 weeks of pregnancy, and §9 (1)

CONCURRENCE AND OPINION

PLANNED PARENTHOOD vs. MISSOURI, 13 L. ED. 2D 481 (1975)

and 11 imposing reporting and maintenance of record requirements for health facilities and the physician who performs abortions.

The case was presented to a three-judge District Court concerned primarily to the provisions of 28 U.S.C. §§ 2281 and 2284 (1962 & Supp. 1962-1975). The court ruled that the two physician plaintiffs had standing, inasmuch as § 6(1) provides that the physician who fails to exercise the prescribed standard of professional care due the fetus in the abortion procedure shall be guilty of manslaughter, and § 14 provides that any person who performs or aids in the performance of an abortion, contrary to the provisions of the Act shall be guilty of a misdemeanor. *Id.* at 486-487. Due to this obvious standing of the two physicians, *id.* at 487, the court deemed it unnecessary to determine whether Planned Parenthood also had standing.

On the issues as to the constitutionality of the several challenged sections of the Act, the District Court, largely by a divided vote, ruled that all except the first sentence of § 6(1) withstood the attack. That sentence was held to be constitutionally impermissible because it imposed upon the physician the duty to exercise at all stages of pregnancy "that degree of medical skill, care and diligence to preserve the life and health of the fetus" that would be required "to preserve the life and health of any fetus intended to be born." Inasmuch as this sentence exceeds the stage of pregnancy prior to viability, the provision was constitutionally overbroad. *Id.* at 474.

The judge concerned by a judge dissented in part. *Id.* at 474. He agreed with the majority as to the constitutionality of §§ 2, 3, 4, 2, 10, and 11 respectively relating to the definition of "viability," the woman's right to the consent, maintenance of records

Standing

U. S. & 14 PAP. OF. NO. 8

and retention of records. He also agreed with the majority that § 6 (1) was unconstitutionally overbroad. He dissented from the majority only in upholding the constitutionality of §§ 3, 3(1), 3(4), 7, and 9 relating respectively, to spousal consent, parental consent, the termination of parental rights, and the prescription of saline amniocentesis.

In No. 74-1451, the plaintiffs agreed from that part of the District Court's judgment upholding sections of the Act as constitutional and denying injunctive relief against their abolition and enforcement. In No. 74-1419, the defendant Attorney General cross-appeals from that part of the judgment holding § 6 (1) unconstitutional and enjoining enforcement thereof. We granted the plaintiffs' application for stay of enforcement of the Act pending appeal. 420 U. S. 918 (1975). Probable jurisdiction of both appeals thereafter was noted. 421 U. S. 815 (1975).

For convenience, we shall usually refer to the plaintiffs as "appellants" and to both named defendants as "appellees".

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In *Roe v. Wade*, the Court concluded that the right of privacy, whether it is "rooted in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," as claimed it is, or as the District Court determined it to be. Any "due" due's reservation of rights to the people is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U. S. at 154. It conclusively rejected, however, the proposition and held that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she chooses. *Roe*. Instead,

this right must be considered against important state interests in regulation. . . . *Id.* at 154.

The Court went on to say that the "pregnant woman cannot isolate her privacy" for six trimesters without being subjected to a fetus. . . . *Id.* at 159. It was therefore "reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life becomes significantly involved." The woman's privacy is no longer "a claim of right of privacy she possesses must be respected accordingly." . . . *Id.* The Court stressed the means of the State's interest by "the light of present medical knowledge." . . . *Id.* at 163. It concluded that the "supremacy of state regulation was to be viewed in three stages." For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation "must be left to the medical judgment of the pregnant woman's attending physician" without interference from the State. . . . *Id.* at 164. The participation of the attending physician in the abortion decision and the supervision of that decision, that is, were emphasized. After the first stage, as so described, the State may, at all times, reasonably regulate the abortion procedure to preserve and protect maternal health. . . . *Id.* For the third stage, subsequent to viability, in part we emphasize that the physician's professional determination, not the mere possession of legal medical skill and technique, is the key. The State may, e.g., require abortion to be performed in a hospital and even may prescribe additional procedures, where it is necessary, an appropriate medical judgment for the preservation of the life or health of the mother. . . . *Id.* at 167-68.

<sup>3</sup> The Court also stated that the State may regulate the abortion procedure to preserve and protect maternal health. . . . *Id.* at 167. The Court also stated that the State may, e.g., require abortion to be performed in a hospital and even may prescribe additional procedures, where it is necessary, an appropriate medical judgment for the preservation of the life or health of the mother. . . . *Id.* at 167-68.

standing  
OK

We agree, of course, with the District Court that the physician-appellants clearly have standing. This was established in *Roe v. Wade*, 410 U. S. at 188. We, therefore, need not pass upon the question of the standing of Planned Parenthood to challenge the Act. *Id.* at 189. Our of duty task, then, is to consider each of the challenged provisions of the new Missouri abortion statute in the particular light of the opinions and decisions in *Roe* and in *Doe*. To this we now turn, with the assistance of helpful briefs from both sides and from some of the amici.

*Defectiveness of viability*—Section 2(2) of the Act defines "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Appellants claim that this definition violates and conflicts with the discussion of viability in our opinion in *Roe*, 410 U. S. at 160, 163. In particular, appellants object to the failure in the definition to contain any reference to a gestational time period, or as failing to incorporate and reflect the three stages of pregnancy in the presence of the word "indefinitely" and to the extra burden of regulation imposed. It is suggested that the definition expands the Court's definition of viability as expressed in *Roe*, and amounts to a legislative redefinition of what is properly a matter for judicial judgment. It is said that the "mere possibility of maintenance in life is not the medical standard of viability." Brief for Appellants 67.

The *Roe* opinion, in turn, is *quibbled* to signify the point at which the fetus can be born and live outside the mother's womb, albeit with artificial aid, and ostensibly cannot or cannot easily do outside the mother's



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womb," 410 U. S., at 160, 163. We noted that this point "is usually placed" at about seven months or 28 weeks, but may occur earlier. *Id.*, at 160.

We agree with the District Court and conclude that the definition of viability in the Act does not conflict with what was said and held in *Roe*. In fact, we believe that § 2 (c), even when read in conjunction with § 5 (proscribing an abortion "not necessary to preserve the life or health of the mother . . . unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable"), the constitutionality of which is not explicitly challenged here, reflects an attempt on the part of the Missouri General Assembly to comply with our observations and discussion in *Roe* relating to viability. Appellant Hall, in his deposition, had no particular difficulty with the statutory definition.<sup>2</sup> As noted above, we recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term. Section 2 (2) does the same. Indeed, one might argue, as the appellees do, that the presence of the statute's words "continued indefinitely" favor, rather than disfavor, the appellants, for, arguably, the point when life can be "continued indefinitely outside the womb" may well occur later in pregnancy than the point where the fetus is "potentially able to live outside the mother's womb." *Roe v. Wade*, 410 U. S., at 160.

In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each

<sup>2</sup> "[A]lthough I agree with the definition of 'viability,' I think it must be understood that viability is a very difficult state to assess." Transcript 369.

Definition  
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Viability  
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a medical  
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pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician. The definition of viability in § 2 (2) merely reflects this fact. The appellees do not contend otherwise, for they insist that the determination of viability rests with the physician in the exercise of his professional judgment.<sup>3</sup>

We thus do not accept appellants' contention that a specified number of weeks in pregnancy must be fixed by statute as the point of viability. See *Wolfe v. Schroering*, 388 F. Supp. 631, 637 (WD Ky. 1974); *Hodgson v. Anderson*, 378 F. Supp. 1008, 1016 (Minn. 1974), *dismissed* for want of jurisdiction *sub nom. Spannaus v. Hodgson*, 420 U.S. 903 (1975).<sup>4</sup>

We conclude that the definition in § 2 (2) of the Act does not circumvent the limitations on state regulation outlined in *Roe*. We therefore hold that the Act's definition of "viability" comports with *Roe* and withstands the constitutional attack made upon it in this litigation.

## B

*The woman's consent.* Under § 3 (2) of the Act, a woman, prior to submitting to an abortion during the

<sup>3</sup> "The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis." Brief for Appellees 26. "Because viability may vary from patient to patient and with advancements in medical technology, it is essential that physicians make the determination in the exercise of their medical judgment." *Id.*, at 28. "Defendant agrees that 'viability' will vary, that it is a difficult state to assess . . . and that it must be left to the physician's judgment." *Id.*, at 29.

<sup>4</sup> The Minnesota statute under attack in *Hodgson* provided that a fetus "shall be considered potentially 'viable' " during the second half of its gestation period. Noting that the defendants had presented no evidence of viability at 20 weeks, the three-judge district court held that that definition of viability was "unreasonable and cannot stand." 378 F. Supp. at 1016.

## PLANNED PARENTHOOD OF MISSOURI v. DANFORTH 11

first 12 weeks of pregnancy, must certify in writing her consent to the procedure and "that her consent is informed and freely given and is not the result of coercion." Appellants argue that this requirement is violative of *Roe v. Wade*, 410 U. S., at 164-165, by imposing an extra layer and burden of regulation on the abortion decision. See *Doe v. Bolton*, 410 U. S., at 195-200. Appellants also claim that the provision is overbroad and vague.

The District Court's majority relied on the propositions that the decision to terminate a pregnancy, of course, "is often a stressful one," and that the consent requirement of § 3 (2) "insures that the pregnant woman retains control over the discretions of her consulting physician." 392 F. Supp., at 1368, 1369. The majority also felt that the consent requirement "does not single out the abortion procedure, but merely includes it within the category of medical operations for which consent is required." *Id.*, at 1369. The third judge joined the majority in upholding § 3 (2), but added that the written consent requirement was "not burdensome or chilling" and manifested "a legitimate interest of the state that this important decision has in fact been made by the person constitutionally empowered to do so." 392 F. Supp., at 1374. He went on to observe that the requirement "in no way interposes the state or third parties in the decision-making process." *Id.*, at 1375.

We do not disagree with the result reached by the District Court as to § 3 (2). It is true that *Doe* and *Roe* clearly establish that the State may not restrict the decision of the patient and her physician regarding abor-

\* Apparently, however, the only other Missouri statutes concerned with consent for general medical or surgical care relate to persons committed to the Missouri state chest hospital, Mo. Rev. Stat. § 199.240 (1969) or to mental or correctional institutions, *id.*, § 105.700.

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tion during the first stage of pregnancy. Despite the fact that apparently no other Missouri statute requires a patient's prior written consent to a surgical procedure,<sup>6</sup> the imposition by § 3 (2) of such a requirement for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional contravention in requiring it only for some types of surgery as, for example, an intra-cardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.

We hasten to observe, however, that by our approval of the consent requirement on the part of the woman, we are not to be understood as assuming that a written consent is necessarily efficacious. Just as in the criminal area with respect to a purported confession, a patient who signs a prior consent often may retreat to the position that she did not really know what she was signing, or that it was insufficiently explained, or that she misunderstood the risk. There are other factors, too: a

<sup>6</sup> There is some testimony in the record to the effect that taking from the patient a prior written consent to surgery is the custom. That may be so in some areas of Missouri, but we definitely refrain from characterizing it extremely as "the universal practice of the medical profession" as the appellates do. Brief for Appellees 32.



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written consent requirement may place the physician in a position where he appears only to be protecting himself, or to be looking out more for his own interests than for his patient's, or to be uncertain in his mind about the soundness of his consultative advice. The written consent may accomplish little, and perhaps nothing, in any given case. It may or may not coincide with what is good medical or surgical practice with respect to the particular patient. Having said all this, however, we are satisfied that the requirement of § 3 (2) with respect to a prior written consent from the pregnant woman does not violate federal constitutional precepts.<sup>7</sup>

## C

*The spouse's consent.* Section 3 (3) requires the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless "the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."<sup>8</sup>

The appellees defend § 3 (3) on the ground that it was enacted in the light of the General Assembly's "perception of marriage as an institution," Brief for Appellees 34, and that any major change in family status is a decision to be made jointly by the marriage partners.

The appellants' vagueness argument centers on the word "informed." One might well wonder, offhand, just what "informed consent" of a patient is. The three Missouri federal judges who comprised the three-judge District Court, however, were not concerned, and we are content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

<sup>7</sup> It is of some interest to note that the condition does not relate, as most statutory conditions in this area do, to the preservation of the life or health of the mother.

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have profound effects on the future of any offspring, efforts that are both physical and mental, and possibly decisions. Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the son so unilaterally the ability to procreate the way from stimulating and pregnancy when the State itself lacks that right. See *Frischmuth v. Board*, 405 U.S. 8, 438, 456 (1972).

It seems manifest that, ideally, the decision to terminate a pregnancy should be one conferred in by both the wife and her husband. No marriage may be viewed as having entered as successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering amity and fidelity in a marriage and of strengthening the marital relationship and the marriage institution will be achieved by giving the husband a veto power exercisable for no reason, whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority stressed, the interest of the state in promoting the continuity of decisions vital to the marriage relationship. 364 F. Supp. at 4370.

When a woman is of course that when a woman with the approval of her parents, but without the approval of her husband, chooses to remain, to keep pregnancy, it could be said that she is acting unilaterally. The obvious fact is that while she is the one who is asked to disagree, this decision is made collectively, by the two marriage partners, one even. Second is the woman who physically keeps the fetus, even as the fetus already and in fact, mainly, is lost, by the abortion, as between the two, the one who is not the one who is lost. *Rev. & Mod.*, 410 (1982), 415.

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We conclude that § 3.40 of the Missouri Act is inconsistent with the standards enumerated in *Roe v. Wade*, 410 U.S. 113, 49 L. Ed. 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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*Parental Consent*—section 3.40 requires, with respect to the first 22 weeks of pregnancy, where the woman is a minor and under the age of 18 years, the written consent of a parent or person in loco parentis (unless, again, the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother). It is to be observed that only one parent need consent.

The appellous critic of the statute in several ways. They point out that the law properly may subject minors to more stringent limitations than are permissible with respect to adults and they cite, among other cases, *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Meyer v. Board of Education*, 103 U.S. 528 (1871). Missouri law it is said is replete with provisions reflecting the interest of the state in assuring the welfare of minors, citing statutes relating to *neglect and abuse* for a court proceeding to the court of the parent and *neglect and abuse* of a child by a parent or guardian. Brief for Appellous. It is certain, however, that consideration of the state's interest in the welfare of a minor's ability to act in the interest of the minor in the interest of the public health statutes preserving the safety of minors and laws governing consent to a legal abortion, and other statutes relating to minors' exposure to certain types of literature, the purchase of fireworks or property, the use of firearms, the sale of cigarettes and alcohol,

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beverages to minors. It is pointed out that the record contains testimony to the effect that children of tender years (even ages 10 and 11) have sought abortions. Thus, if a State were to permit a child to obtain an abortion without the counsel of an adult "who has responsibility or concern for the child, would constitute an irresponsible abdication of the States' duty to protect the welfare of minors." *Id.*, at 34. Parental discretion, too, has been protected from unwarranted or unreasonable interference from the State, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Finally, it is said that §3(4) imposes no additional burden on the physician because even prior to the passage of the Act the physician would require parental consent before performing an abortion on a minor.

The appellants, in their turn, emphasize that no other Missouri statute specifically requires the additional consent of a minor's parent for medical or surgical treatment and that in Missouri a minor legally may consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse. Mo. Laws 1971, p. 425-426, H. B. No. 73, §3(1-3). The result of §3(4), it is said, "is the ultimate supremacy of the parents' desires over those of the minor child in program content." *Id.*, at 34. Appellants say: "It is noted that in Missouri a woman who marries with parental consent under the age of 18 does not require parental consent to abort, and yet someone temporarily who has chosen not to marry must obtain parental approval."

The District Court majority recognized that, in contrast to §3(3), the States' interest in protecting the institution of marriage and the status of the parent with respect to §3(4) "is based on a compelling basis," flows from the State's "interest in safeguarding the authority



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of the family relationship. 392 F. Supp. at 1370. The dissenting judge observed that one could not seriously argue that a minor must submit to an abortion if her parents insist, and he could not see "why she would not be entitled to the same right of self-determination now explicitly accorded to adult women provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician." *Id.*, at 1376.

Of course, much of what has been said above, with respect to § 3.031, applies with equal force to § 3.04. Other courts that have considered the parental consent issue in the light of *Roe* and *Doe*, have concluded that a statute like § 3.04 "does not withstand constitutional scrutiny." See, e. g., *Poe v. Gerstein*, 517 F. 2d, at 792; *Wells v. Schaeffer*, 388 F. Supp. at 630-637; *Doe v. Roeptoe*, 300 F. Supp. at 193, 196; *State v. Keom*, 84 Wash. 2d 901, 530 P. 2d 260 (1975).

We agree with appellants and with the courts whose decisions have just been cited that the State may not impose a blanket provision such as § 3.04, requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. See, e. g., *Breed v. Jones*, 421 U. S. 519 (1975); *Goss v. Lopez*, 419 U. S. 565 (1975); *Tinker v. Des Moines*

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*School District*, 393 U. S. 503 (1969); *Id. re Gault*, 387 U. S. 1 (1967). The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults. *Prince v. Massachusetts*, 321 U. S. at 170; *Ginsberg v. New York*, 390 U. S. 629 (1968). It remains, then, to examine whether there is any significant state interest in conditioning an abortion on the consent of a parent or parents *in loco parentis* that is not present in the case of an adult.

One suggested interest is the safeguarding of the family unit and of parental authority. 392 F. Supp. at 1376. It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination made by the physician and his minor patient to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

We emphasize that our holding that § 31.04 is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. If a minor is incapable of giving meaningful consent,<sup>2</sup> the appropriate concerned party, whether parent, guardian, or guardian *ad litem*, must be the decisionmaker along with the minor and the physician. This is the usual rule for any nonemergency med-

<sup>2</sup> In order to give an intelligent consent, a minor must be capable of understanding the consequences of a decision and must be sufficiently mature to understand the nature of the decision. See *Id.*

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ical procedure when the minor is incapable of comprehending the situation. But where the minor has that capability, she may act alone with her physician's guidance. Indeed, even under existing Missouri statutory law, as noted above and as the appellants emphasize, a minor, acting alone, may give legally effective consent to medical care for pregnancy "other than an abortion" or for venereal disease or for drug abuse. Mo. Laws 1971, pp. 425-426, H. B. No. 73 § 133. The fault with § 3-41 is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction. It violates the structures of *Roe* and *Doe*.

At this point we add a word as to the physician's posture in the abortion procedure. As noted above *Roe* approved no "abortion on demand" routine. *Roe* plainly emphasized that, for the earliest or first stage of pregnancy, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." 410 U. S. at 164. We repeat: this is a *medical* judgment, not a *layman's* judgment, and it is to be exercised professionally and in professional consultation with the patient. No assembly-line technique, devoid of professional and personal contact and without the exercise of professional judgment in the patient's particular case, was contemplated or approved, and is not now approved. The responsibility of the attending physician and, indeed, of the medical profession itself, are evident, are not to be avoided, and are necessarily an inherent part of the abortion decision.

## E

*State wardship of the unborn infant.* Section 7 applies "where a live born infant results from an attempted

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abortion which was not performed to save the life or health of the mother.' The statute then provides that the infant "shall be an abandoned ward of the state" and that the mother and the father, too, if he consented to the abortion, "shall have no parental rights or obligations whatsoever relating to such infant."

The District Court majority observed that the "fate of such a live-born infant is surely of as much interest to the state as the interest in potential human life which the state can protect under *Roe*." 382 F. Supp. at 1371. It regarded the situation as similar to an abandonment of the child, and it observed that under the Act due process was provided the parents and afforded adequate protection to them if they "might desire to regain custody of such a child." *Id.*, at 1372. The dissenting judge viewed the statute as lacking in procedural due process and as totally terminating parental rights upon the birth of the child. He felt the statute proposed to take a live-born child from its parents, if they had consented to an abortion, on the assumption that the child was their "unwanted" and the mother unworthy. *Id.*, at 1377.

The appellous assert that § 7 is predicated upon the fact "that the parents consented to the attempted destruction of the unborn fetus" and assert that a woman desiring an abortion "does not want a live-born child." Thus, inherent in the decision to abort is a threat to the well-being of the child "which the legislature reasonably believed required the termination of parental rights." Brief for Appellous 55. They argue that the State is responsible for the protection of an unwanted child whom the mother knowingly has tried to destroy. Any presumption of unfitness under the statute, it is said, is rebuttable, for the parents may petition for custody on the ground that they are fit parents for the child not-

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withstanding their prior consent to the abortion. The standing of the appellants to challenge § 7 is questioned.

The appellants characterize the statute as "a crude and coercive threat to dissuade women from electing abortion," and as a provision "totally unrelated to the interests of maternal health." Brief for Appellants 111. They further point out that there is no other Missouri statute providing for an arbitrary and conclusive termination of parental rights in this way, and that even a consensual father is not subjected to such loss of his parental rights.

This Court in *Roe* recognized that the State has an important and legitimate interest in the protection of potential human life. 410 U. S., at 162-163. Section 7, however, deprives the parents of the newborn infant of any and all rights of parenthood and does so forthwith upon the birth, "as if the parental rights had been terminated" (emphasis supplied) pursuant to Mo. Rev. Stat. § 211.441 (1969).<sup>1</sup> It does not provide even minimum opportunity for hearing before the infant automatically is made a ward of the State. The statute plainly deprives the parents of due process by taking their child from them while preventing them from attempting to show that they have not abandoned the child or that they will be fit parents. They are, after all, the parents, not just persons merely in an adoptive posture. The decision in *Sniadach v. Illinois*, 406 U. S. 645 (1972), obviously controls. There the Court determined that all Illinois parents were "constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id.*, at 658. So it is here under the Missouri system. There is no requirement or even suggestion, under § 7, and its "as if" language,

<sup>1</sup> Compare, e. g., § 7 to Mo. Rev. Stat. § 211.441, which controls the removal of a child from its parents.



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judge that the termination of parental rights occurs only after a proper court finds abandonment or parental unfitness, as § 211.141 provides. Section 7 serves to deny this right, of, as was the Illinois statute in *Shelby*, is unconstitutional. See *Armstrong v. Mayo*, 380 U.S. 545 (1965). See also *Jones v. Smith*, 278 So. 2d 339, 344, Fla. 3d App. 1973, cert. denied, 415 U.S. 958 (1974).

1

*Saline amniocentesis*. Section 10 of the statute prohibits the use of saline amniocentesis as a method of terminating abortion after the first 12 weeks of pregnancy. It describes the method as one whereby the amniotic fluid is withdrawn and "a saline or other fluid" is returned to the amniotic sac. The statute imposes this prohibition on the ground that the technique "is known to medical experts" and places it in the form of a legislative finding. Appellants challenge this provision on the ground that it operates to preclude virtually all abortions after the first trimester. This is so, it is claimed, because a substantial percentage (in the neighborhood of 70%) according to the testimony of all abortions performed in the United States after the first trimester are effected through the procedure of saline amniocentesis. Appellants stress the fact that the alternative means of resuscitation and hysterectomy are significantly more dangerous and critical for the woman than the saline termination. They also point out that the mortality rate for medical abortion exceeds that where saline amniocentesis is employed. Finally, appellants note that the patient's safer alternative of prostaglandin abortion is suggested, not strongly relied upon by the government, just at the time of the trial is not yet widely available.

We note in *Roe* that at the first stage "The State,



2. PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

of the prostaglandin technique, which, although promising, was used only on an experimental basis until less than two years before. (See *Holm v. Schering*, 388 F. Supp. at 637, where it was said that at that time (1974) "there are no physicians in Kentucky competent in the technique of prostaglandin amniotic infusion.") And the State offered no evidence that prostaglandin abortions were available in Missouri. Third, the statute's reference to the insertion of "a saline or other fluid" appears to include within its proscription the intra-amniotic injection of prostaglandin itself and other methods that may be developed in the future and that may prove highly effective and completely safe. Finally, the majority did not consider the medically inferior (in 1974) use of saline but does not prohibit techniques that are many times more likely to result in maternal death. (See 3-2 F. Supp. at 1378 n. 8 (dissenting opinion).)

These unperceived or overlooked factors place the State's decision to ban use of the saline method in a completely different light. The State, through §9, would prohibit the use of a method which the record shows is the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth. The legislative intervention establishes a *per se* rule that saline amniocentesis, a professionally accepted procedure, is to be outlawed, if it merely is a flat and naked interference with the exercise of standard professional judgment tailored to an individual patient's particular case. There is no alleged claim that the procedure is beyond accepted medical practice, or that medical standards are being abused or abandoned, or that the physician is acting heedlessly. Cf. *United States v. Moore*, 423 U.S. 122 (1975):

## PLANNED PARENTHOOD OF MISSOURI v. DANFORTH 27

As so viewed, the outright legislative proscription falls as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge. See *Wolfe v. Schering*, 388 F. Supp. at 637.

## G

*Recordkeeping.* Sections 10 and 11 of the Act impose recordkeeping requirements for health facilities and physicians concerned with abortions irrespective of the pregnancy stage. Under § 10, each such facility and physician is to be supplied with forms "the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law." The statute states that the information on the forms "shall be confidential and shall be used only for statistical purposes." The records, however, may be requested and health data acquired by local, state, or national public health officers. Under § 11 the records are to be kept for seven years in the permanent files of the health facility where the abortion was performed.

Appellants object to these reporting and recordkeeping provisions on the ground that they, too, impose an extra layer and barrier of regulation, and that they apply throughout all stages of pregnancy. All the judges of the District Court panel, however, viewed these provisions as statistical requirements "essential" to the advancement of medical knowledge, and as nothing that

28 CONSTITUTIONAL ATTENTION OF MISSOURI, DANFORTH

would not stand in the abortion decision itself or the exercise of medical judgment in performing an abortion." 492 U.S. app. at 1374.

One may conceive that there are important and perhaps conflicting interests affected by record-keeping requirements. On the one hand, the retention of records needed may be helpful in developing information pertinent to the preservation of maternal health. On the other hand, as we stated in *Roe*, during the first stage of pregnancy the state may impose "restrictions or regulations governing the medical judgment of the pregnant woman's attending physician with respect to the termination of her pregnancy." 410 U.S. at 113, 114. Furthermore, it is readily apparent that one reason for the record-keeping requirement, namely, to assure that all abortions in Missouri are performed in accordance with the Act, relies somewhat on the insignificance or in view of our holding above as to spousal and parental consent requirements.

Record-keeping and reporting requirements that are necessarily oriented to the preservation of maternal health and that properly respect a patient's confidentiality are certainly permissible. This surely is so for the period after the first stage of pregnancy, for then the State may enact statutes as well as record-keeping requirements that are reasonable means of protecting maternal health. As to the first stage, however, anyone forced to say the least must find that the State could not be deemed to have any record-keeping requirements that significantly differ from those applied with respect to other, and equally delicate medical or surgical procedures. We conclude, even so, that the provisions of §§ 10 and 11, which are imposing a reasonable permissible limit, are not constitutionally excessive in themselves. Record-keeping requirements are professionally sound and not abused or



PLANNED PARENTHOOD OF MISSOURI, INC. v. BOYKOFF, 29

overdone, can be used to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." The added requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length, assist and persuade us in our determination of the constitutional limits. As so regarded, we see no legally significant impact or consequence on the abortion decision of on the physician-patient relationship. We naturally assume, furthermore, that these record-keeping and record-maintaining provisions will be interpreted and enforced by Missouri's Division of Health in the light of our decision with respect to the Act's other provisions, and that, of course, they will not be utilized in such a way as to accomplish, through the sheer burden of record-keeping detail, what we have held to be an otherwise unconstitutional restriction. Information that is required for the records must not include such things as the spousal or parental consent that have been invalidated by a

II

*Standard of care.* Appellee Danforth in No. 74-1419 appeals from the unanimous decision of the District Court in No. 74-1419 of the Act is unconstitutional. That court's opinion is:

No person who performs or induces an abortion shall be held to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to ex-

\* We note that Missouri's existing statutory scheme for the regulation of abortion is contained in Mo. Rev. Stat. §§19.050 to 19.130 (2000). The proposed amendments §§19.050 to 19.120 and 19.130 are contained in the bill introduced by Representative Danforth, H. Bill No. 1000, 95th General Assembly.

UNITED STATES SUPREME COURT

NO. 00-1000. VOLUNTARY ABORTION. DANNENBERG

...in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter. Further, such physician or other person shall be liable in an action for damages."

The District Court held that the first sentence was unconstitutionally overbroad because it failed to exclude more as much the stage of pregnancy prior to viability. 392 F. Supp. at 1371.

The Attorney General argues that the District Court's characterization is erroneous and unnecessary. He claims that the first sentence of § 6(1) establishes only the general standard of care that applies to the person who performs the abortion, and that the second sentence describes the circumstances when that standard of care applies, namely, when a live child results from the procedure. Thus, the first sentence, it is said, despite its reference to the fetus, has no application until a live birth occurs.

The appellants, of course, agree with the District Court. They take the position that § 6(1) imposes its standard of care upon the person performing the abortion even though the procedure takes place before viability. They argue that the statute on its face effectively prohibits abortion, and was meant to do just that.

We are not at all that requires federal court abstention in this case. *Powers v. Chesapeake*, 460 U.S. 433, 437 (1983); *Quinn v. Kasper*, 414 U.S. 34, 54-55 (1973). And, like the three judges of the District Court, we are unable to accept the appellee's sophisticated interpretation of the statute. Section 6(1) requires the physician to employ the appropriate skill, care, and skill.

# CONSTITUTIONAL OPINIONS

PLANNED PARENTHOOD OF MISSOURI, INC. v. DENTON, 477

260, 1986, 1986 WL 10000, 1986 WL 10000, 1986 WL 10000. It goes on to say that such action may be taken only after the stage of viability has been reached. As the provision now reads it, it permissibly requires the physician to preserve the life and health of the fetus whatever the stage of pregnancy. The fact that the second sentence of § 16-1 refers to a minimum point at which the physician has the responsibility to encourage or to sustain the life of the child, and the death of the child results if no steps are applied, simply does not modify the duty imposed by the first sentence insofar that a duty to proceed exists that has reached the stage of viability.

Finally, it is hardly arguable that if the first sentence of § 16-1 does not survive constitutional attack, the second sentence does as well under the Act's severability provision. § 16-1 is severable from the first. The District Court's ruling on preconstituted validity, 392 F. Supp. at 1471, more specifically refers to the first sentence but its conclusion of invalidity to the judgment "validated all of § 16-1." *Id.* at 1471. This Statement, No. 74-1419 A-34. Appellee Dementino's motion to alter or amend the judgment, so far as the second sentence of § 16-1 was concerned, was denied by the District Court. *Id.* at A-39.

We respectfully inform the District Court that § 16-1 operates as a total ban on abortion. Its provisions are inextricably intertwined and a preservation of other provisions would be impossible to protect a newborn infant surely and certainly in protection in Missouri under the State's abortion statutes.

The District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

APPENDIX

H. C. S. HOUSE BILL NO. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) "Abortion," the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) "Viability," that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) "Physician," any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

SECTION 13-110. CONSENT

PLANNED PARENTHOOD OF MISSOURI, INC. (PENDING)

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.

(3) When the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) When the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 13-111. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except when the provisions of section 3 of this act are satisfied in a hospital.

SECTION 13-112. No abortion not necessary to preserve the life of a mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 13-113. (1) No person who performs or induces an abortion shall fail to exercise that degree of medical skill, care and diligence to preserve the life and health of the woman when such person would be required to exercise such care to preserve the life and health of a child to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encouraging to state the date of the date and the length of the child results shall be guilty of a class A misdemeanor and upon conviction shall be punished as provided in Section 550.140. (2) Any physician or other person shall be liable in civil action for damages as provided in Section 550.140. (3) Any



ARTICLE II. SHORT TITLE

SECTION 1. SHORT TITLE OF MISSOURI ABORTION ACT

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

SECTION 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the supervision of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

SECTION 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the physician shall certify in writing that she has been so informed.

SECTION 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is dangerous to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

SECTION 10. Every health facility and physician

## PLANNED PARENTHOOD—(PENDING)

### PLANNED PARENTHOOD OF MISSOURI - DRAFTED 15

shall be supplied with forms promulgated by the division of health. The purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data required by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist in actions made unlawful by this act shall be deemed to having his license application for license or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri revoked or annulled by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and a second violation shall be punished as provided by law.

94. PLANNED PARENTHOOD OF MISSOURI - HANFORTH

SECTION 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.

MEMORANDUM

TO: Phil Jordan  
FROM: Lewis F. Powell, Jr.

DATE: May 27, 1976

No. 74-1151 and 74-1419 Planned Parenthood

I have subjected Justice Blackmun's circulation of May 26 to a "first reading", and - subject to your comments - am prepared to join almost all of it.

Without rechecking my notes, I believe he has decided each issue in accordance with my Conference vote except the definition of viability (§ 2(2)], discussed in Part IV-A (p. 8) of the opinion. There is a good deal to be said for the opinion's treatment of this issue. It emphasizes that viability is "a matter of medical judgment" and "the flexibility of the term" is emphasized. There is also a recognition that medical knowledge and capability are not likely to stand still.

This type of reasoning has considerable appeal. It does not, however, meet the objection which we have discussed, namely, that the issue is still left/a <sup>to</sup> jury decision with the result that cautious physicians will be reluctant to act toward the end of the first trimester.

My present disposition is to advise Justice Blackmun that I expect to join all of his opinion except Part IV-A, as to which I may dissent.

When you have had an opportunity to read the opinion,  
we should have a brief talk.

L.F.P., Jr.

88

But after a second  
reading, I have serious  
reservations as to other  
~~parts~~ issues (esp. parental  
consent) and the general  
tone of the op. It  
also make unreflective  
assumption as to role  
of physicians.

LFP



Supreme Court of the United States  
Washington, D. C. 20543

U.S. DEPT. OF JUSTICE  
JUL 1 1976

May 28, 1976

RE: No. 74-1151 and 74-1419 Planned Parenthood v.  
Burlington, et al.

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

et The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUDGE JOHN PAUL STEVENS

May 28, 1976

Re: 74-1151 and 74-1419 - Planned Parenthood v.  
Danforth

Dear Harry:

Except for Parts IV D and IV F, I will join your excellent opinion. I will soon circulate a short opinion dissenting from Part IV D and concurring in the result in Part IV F.

Sincerely,



Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHIEF JUSTICE  
JUSTICE POTTER STEWART

June 1, 1976

Re: Nos. 74-1151 and 74-1419  
Planned Parenthood v. Danforth

Dear Harry,

I shall await John's separate  
opinion in these cases.

Sincerely yours,

PS.

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice *LJP*  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stewart

Circulated: *6/1/76*

2nd DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

Nos. 74 1151 AND 74 1419

Planned Parenthood of Central  
Missouri et al.,  
Appellants,  
74 1151 v.

John C. Danforth, Attorney  
General of the State of  
Missouri, et al.

John C. Danforth, Attorney  
General of the State of  
Missouri, Appellant,  
74 1419 v.

Planned Parenthood of Central  
Missouri et al.

On Appeals from the  
United States District  
Court for the Eastern  
District of Missouri.

*Reversed*

*LJP*

*6/3*

*This is*

*per curiam*

*on parental*

*consent*

[June — 1976]

MR. JUSTICE STEWART, concurring in part and dissenting in part.

In *Roe v. Wade*, 410 U. S. 113, the Court held that a woman's right to decide whether to abort a pregnancy is entitled to constitutional protection. That decision, which is now part of our law, answers the question discussed in Part IV. F of the Court's opinion, but merely poses the question decided in Part IV. D.

If two abortion procedures had been equally accessible to Missouri women, in my judgment the United States Constitution would not prevent the state legislature from outlawing the one, it would be the less safe even though its conclusion might not reflect a unanimous consensus or informed medical opinion. However, the record indicates that when the Missouri statute was enacted, a prohibition of the *ultra gravis* *intra*

## 2. PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

procedure was almost tantamount to a prohibition of any abortion in the State after the first 12 weeks of pregnancy. Such a prohibition is inconsistent with the essential holding of *Roe v. Wade* and therefore cannot stand.

In my opinion, however, the parental consent requirement is consistent with the holding in *Roe*. The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in preventing a young person from causing harm to himself justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

The abortion decision is, of course, much more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if we assume that it is the most important kind of decision, a young person may ever make, that assumption merely enhances the quality of



PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well.

Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. Moreover, it is perfectly clear that the parental consent requirement will necessarily involve a parent in the decisional process.

If there is no parental consent requirement, unquestionably many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, harassing or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either "so perfect" that communication and accord will take place or else so imperfect that the absence of communication reflects the child's covert predilection that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested

yes

## 4. PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

in the welfare of their children, and further, that the imposition of a parental consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant child in a distress situation to make and to implement a correct decision.

I assume that parents will sometimes prevent abortions which might better be performed, and other parents may advise abortions that should not be performed. Similarly, even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales.

The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives.<sup>1</sup> *Id.*, at p. 20 n. 10. This assumption is of course correct and consistent with the predicate which underlies all State legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a restriction is imprecise and perhaps even unjust in particular cases. The Court seems to assume that the capacity to exercise a right and the judgment of the physician are the only constitutionally permissible standards for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment. Even if it were correct, however, as a matter of constitutional law

*not do  
they  
counsel  
in clinics*

PLANNED PARENTHOOD OF MISSOURI v. DANFORTH 5

I think a State has power to conclude otherwise and to select a chronological age as its standard.

In short, the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental consent requirement.

Supreme Court of the United States  
Washington, D. C. 20543

CHIEF JUSTICE  
JUSTICE THURGOOD MARSHALL

June 2, 1976



Re: Nos. 74-1151 and 74-1519 -- Planned Parenthood v.  
Danforth

Dear Harry:

Please join me.

Sincerely,

*TM*  
T. M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHARLES OF  
JUSTICE BYRON R WHITE

June 4, 1976

Re: Nos. 74-1151 & 74-1419 - Planned Parenthood  
of Central Missouri v. Danforth

Dear Harry:

I shall write in partial dissent in this  
case.

Sincerely,



Mr. Justice Blackmun

Copies to Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 17, 1976

Re: Nos. 74-1151 & 74-1419 - Planned Parenthood v.  
Danforth, et al.

Dear Byron:

Please join me in your dissenting opinion.

Sincerely,



Mr. Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHIEF JUSTICE  
JUSTICE JOHN PAUL STEVENS



June 17, 1976

Re: 74-1151 and 74-1419 - Planned Parenthood v. Danforth

Dear Harry:

Confirming my comment at Conference this morning, I am persuaded by Part III of Byron's dissent and therefore withdraw my concurrence in Part IV-E of your opinion.

Since it seems likely that Byron's position on this issue may command a majority, I will not make any change in the partial dissent which I have already circulated until after the dust settles.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

LFP

No. 74-1151) Planned Parenthood of Central Missouri, et al. v. Danforth

Reviewed  
6/16

No. 74-1419) Danforth v. Planned Parenthood of Central Missouri, et al.

A strong but  
unnecessarily  
strong opinion.

I - Spouse's consent - p 2

*I disagree*

II - Parents consent - p 4

*I agree with much of what Byron says but not with sustaining absolute veto of a parent regardless of maturity & circumstances. I also agree with much of what*

To: THE CLERK OF THE COURT  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 6-16-76

Recirculated: \_\_\_\_\_  
*John has written,*

III Section 7

- Ward of State - 6

*I agree, except I don't think Planned Parenthood has standing. 8*

MR. JUSTICE WHITE, dissenting, in part:

In Roe v. Wade, 410 U.S. 113, this Court created

a right to an abortion free from state prohibition. The task of policing this limitation on state police power

is and will be a difficult and continuing venture in substantive due process. However, even accepting Roe v.

Wade, there is nothing in the opinion in that case and nothing articulated in the Court's opinion in this case

which justifies the invalidation of five provisions of House Committee Substitute for House Bill No. 1211 enacted by the Missouri Seventh-Seventh General Assembly in 1974

in response to Roe v. Wade (hereafter referred to as "the Act"). Accordingly, I dissent, in part.

IV Section 9

*(Saline) - Powerful. I could agree. (p 12)*

V Section 6 (1) - Duty of physician to preserve life  
*I inclined to agree.*

Planned Parenthood, et al.

- 2 -

I

Spousal consent

Roe v. Wade, 410 U.S. 113, 163, holds that until a fetus becomes viable, the interest of the State in the life or potential life it represents is outweighed by the interest of the mother in choosing "whether or not to terminate her pregnancy." Id., at 153. Section 3(3) of the Act provides that a married woman may not obtain an abortion without her husband's consent. The Court strikes down this statute in one sentence. It says that "since the State cannot . . . proscribe abortion . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion . . ." Ante, at 15. But the State is not -- under § 3(3) -- delegating to the husband the power to vindicate the State's interest in the future life of the fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. <sup>1/</sup> It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the State's interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be

protected by the State. A father's interest in having a child -- perhaps his only child -- may be unmatched by any other interest in his life. See Stanley v. Illinois, 405 U.S. 645, 651, and cases there cited. It is truly surprising that the majority finds in the United States Constitution, as it must in order to justify the result it reaches, a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child. Such a rule cannot be found there, nor can it be found in Roe v. Wade, supra. These are matters which a state should be able to decide free from the suffocating power of the federal judge, purporting to act in the name of the Constitution.

In describing the nature of a mother's interest in terminating a pregnancy, the Court in Roe v. Wade mentioned only the post-birth burdens of rearing a child, id., at p. 153, and rejected a rule based on her interest in controlling her own body during pregnancy. Id., at 154. Missouri has a law which prevents a woman from putting a child up for adoption over her husband's objection,



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Section 453.030 R.S. Mo. 1969. This law represents a judgment by the State that the mother's interest in avoiding the burdens of child rearing do not outweigh or snuff out the father's interest in participating in bringing up his own child. That law is plainly valid, but no more so than § 3(3) of the Act now before us, resting as it does on precisely the same judgment.

II

Section 3(4) requires that an unmarried woman under 18 years of age obtain the consent of a parent or a person in loco parentis as a condition to an abortion. Once again the Court strikes the provision down in a sentence. It states: "Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy . . ." Id., at 20. The Court rejects the notions that the State has an interest in strengthening the family unit, or that the parent has an "independent interest" in the abortion

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decision, sufficient to justify the statute and apparently concludes that the statute is therefore unconstitutional. But the purpose of the parental consent requirement is not merely to vindicate any interest of the parent or of the State. The purpose of the requirement is to vindicate the very right created in Roe v. Wade, supra -- the right of the pregnant woman to decide "whether or not to terminate her pregnancy." Id., at 153 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which states have sought to protect children from their own immature and improvident decisions; <sup>2/</sup> and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

The Court's only additional explanation for striking down the parental consent requirement is the

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statement "We repeat: this is a medical judgment, not a layman's judgment." This statement almost defies comprehension. The choice of method by which an abortion is effectuated may be a medical judgment, but the decision whether or not to have a child is no more a medical judgment than the decision whether or not to get married or to have intercourse and conceive. Of course, pregnant women may seek emotional counseling as well as professional advice from their physicians; and, if the physician is wise in addition to being professionally competent, the counseling may be sensible. Indeed, a pregnant woman may seek counsel from her pastor or a friend in connection with her abortion decision. Missouri is nonetheless constitutionally free to conclude that the person most likely to make the abortion decision in the best interests of a minor child is that child's parent; and its conclusion seems eminently sensible to me. <sup>3/</sup>

yes

111

Section 7 of the Act provides that where a live birth results from an attempted abortion not performed to save the life or health of the mother, the infant "shall

be an abandoned ward of the State." The majority concedes that the natural parents may regain custody by bringing a court proceeding and establishing their fitness as parents. Nonetheless, the Court strikes down § 7 because it violates the parents' due process rights not to have their child become a ward of the State until after a hearing on their fitness as parents. The Court must necessarily also be holding as a substantive matter that an attempt by a parent to kill a fetus is an insufficient reason to conclude in every case that the parent is not fit to care for the child, if it turns out to live.

The Court should not have addressed the merits of this issue. The Court decides all of the issues in this case on the theory that the physician-plaintiffs have standing. Ante, at pp. 5, 8. The standing of the other plaintiff, Planned Parenthood of Central Missouri, was not addressed by the court below and is not addressed by this Court. The Court notes in the section of its opinion dealing with the challenge to § 7 that the physician's standing is challenged. For some reason,

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however, it never decides this particular standing issue, except perhaps by implication. It never pauses to explain what conceivable case or controversy exists between the physician-plaintiffs and the State of Missouri over the constitutionality of a provision of Missouri law which makes live babies wards of the State when they result from attempted abortions. The question of who has custody of the children after birth is presumably one of indifference to the physician who performs the abortion. He has no financial stake in it and he has no other stake in it greater than that of a friend of the parents. Indeed, on this record we do not know whether any parent in Missouri, who is unsuccessful in terminating the life of her fetus, will ever want the child to live with her. Therefore, I would remand this issue to the District Court to determine whether Planned Parenthood of Central Missouri has standing, and, if it does not, to dismiss the complaint insofar as it challenges § 7.

*I agree*

*I don't think it has standing.*



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IV

Section 9 of the Act prohibits abortion by the method known as saline amniocentesis -- a method now used for 70 per cent of abortions performed after the first trimester. Legislative history reveals that the Missouri legislature viewed saline amniocentesis as far less safe a method of abortion than the so-called prostaglandin method. The court below took evidence on the question and summarized it as follows:

"The record of trial discloses that use of the saline method exposes a woman to the danger of severe complications, regardless of the skill of the physician or the precaution taken. Saline may cause one or more of the following conditions: Disseminated intravascular coagulation or 'consumptive coagulopathy' (disruption of the blood clotting mechanism [Dr. Warren, Tr. 57-58; Dr. Klaus, Tr. 269-270; Dr. Anderson, Tr. 307; Defendants'

Exhibits H & M)), which may result in severe bleeding and possibly death (Dr. Warren, Tr. 58); hypernatremia (increase in blood sodium level), which may lead to convulsions and death (Dr. Klaus, Tr. 268); and water intoxication (accumulated water in the body tissue which may occur when oxygen is used in conjunction with the injection of saline), resulting in damage to the central nervous system or death (Dr. Warren, Tr. 76; Dr. Klaus, Tr. 270-271; Dr. Anderson, Tr. 310; Defendants' Exhibit L). There is also evidence that saline amniocentesis causes massive tissue destruction to the inside of the uterus (Dr. Anderson, Tr. 308)."

The District Court also cited considerable evidence establishing that the prostaglandin method is safer. In fact, the Chief of Obstetrics at Yale University,

Dr. Anderson, suggested that "physicians should be liable for malpractice if they chose saline over prostaglandin after having been given all the facts on both methods." The Court nevertheless reverses the decision of the District Court sustaining § 9 against constitutional challenge. It does so apparently because saline amniocentesis was widely used before the Act was passed; because the prostaglandin method was seldom used and was not generally available; and because other abortion techniques more dangerous than saline amniocentesis were not banned. The Court then terms the ban on saline amniocentesis "a flat and naked interference with the exercise of standard professional judgment. There is no agreed claim that the procedure is beyond and outside the bounds of accepted medical practice, or that medical standards are being abused or abandoned or that the physician is acting lawlessly." Ante, at 26 (emphasis added).

Whether a physician is acting "lawlessly" generally depends on whether he is acting contrary to a statute passed by the democratically elected legislature of his state; not on whether his conduct meets the standards accepted by some or a majority of other physicians. There

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does not have to be an "agreed claim" that a statute is deemed sensible by physicians before it can pass constitutional muster. A legislature is entitled to enact a "flat and naked interference with the exercise of standard professional judgment," unless it violates some provision of the Constitution in so doing. Physicians are not immune from the law, and from having their "normal" practices forbidden when it is discovered that they are dangerous or that other techniques are safer.

The point of § 9 is to change the practice under which most abortions were performed under the saline amniocentesis method and to make the safer prostaglandin method generally available. It promises to achieve that result, if it remains operative, and the evidence discloses that the result is a desirable one or at least that the legislature could have so viewed it. That should end our inquiry, unless we purport to be not only the country's continuous constitutional convention but also its ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.

Wow

Section 6(1) of the Act provides:

"No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter. . . . Further, such physician or other person shall be liable in an action for damages."



If this section is read in any way other than through a microscope, it is plainly intended to require that, where a "fetus . . . [may have] the capability of meaningful life outside the mother's womb," Roe v. Wade, supra, at 163, the abortion be handled in a way which is designed to preserve that life notwithstanding the mother's desire to terminate it. Indeed, even looked at through a microscope the statute seems to go no further. It requires a physician to exercise "that degree of professional skill . . . to preserve the fetus," which he would be required to exercise if the mother wanted a live child. Plainly, if the pregnancy is to be terminated at a time when there is no chance of life outside the womb, a physician would not be required to exercise any care or skill to preserve the life of the fetus during abortion no matter what the mother's desires. The statute would appear then to operate only in the gray area after the fetus might be viable but while the physician is still able to certify "with reasonable medical certainty that the fetus is not viable." See § 5 of the Act which flatly prohibits abortions absent such a certification. Since the State

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has a compelling interest, sufficient to outweigh the mother's desire to kill the fetus, when the "fetus . . . has the capability of meaningful life outside the mother's womb," Roe v. Wade, supra, at 163, the statute is constitutional.

Incredibly, the Court reads the statute instead to require "the physician to preserve the life and health of the fetus, whatever the stage of pregnancy," ante, at 31, thereby attributing to the Missouri legislature the strange intention of passing a statute with absolutely no chance of surviving constitutional challenge under Roe v. Wade, supra. It is capricious to force the legislature to pass again a statute with exactly the same purpose as the one which the Court today invalidates.

The Court compounds its error by also striking down as unseverable the wholly unobjectionable requirement in the second sentence of § 6(1) that where an abortion produces a live child, steps must be taken to sustain its life. It explains its result in two sentences:

"We conclude, as did the District Court, that § 6(1) must stand or fall as a unit. Its provisions are inextricably bound together."

The question whether a constitutional provision of state law is severable from an unconstitutional provision is entirely a question of the intent of the state legislature. There is not the slightest reason to suppose that the Missouri legislature would not require proper care for live babies just because it cannot require physicians performing abortions to take care to preserve the life of fetuses. The Attorney General of Missouri has argued here that the only intent of § 6(1) was to require physicians to support a live baby which resulted from an abortion.

At worst, § 6(1) is ambiguous on both points and the District Court should be directed to abstain until a construction may be had from the state courts. Under no circumstances should § 6(1) be declared unconstitutional at this point in time.

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VI

I join the judgment and opinion of the Court  
insofar as it upholds the other portions of the  
Act against constitutional challenge.

No. 74-1151) Planned Parenthood of Central  
                  ) Missouri, et al. v. Danforth  
                  )  
No. 74-1419) Danforth v. Planned Parenthood  
                  ) of Central Missouri, et al.

#### FOOTNOTES

1/

There are countless situations in which the State prohibits conduct only when it is objected to by a private person most closely affected by it. Thus a state cannot forbid anyone to enter on private property with the owner's consent, but it may enact and enforce trespass laws against unauthorized entrances. It cannot forbid transfer of property held in tenancy by the entireties but it may require consent by both husband and wife to such a transfer. These situations plainly do not involve delegations of legislative power to private parties; and neither does the requirement in § 3(3) that a woman not deprive her husband of his future child without his consent.

2/

As MR. JUSTICE STEVENS states in his dissenting opinion:

"The State's interest in the welfare of its young citizens justifies a variety of protective measures.



Planned Parenthood, et al.

Fn. page 2

fn. 2 continued/

Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant."

3/

The Court also states:

" . . . No assembly line technique, devoid of professional and personal contact and without the exercise of professional judgment in the patient's particular case, was contemplated or

Planned Parenthood, et al.

Fn. page 3

fn. 3 continued/

approved, and is not now approved. The responsibility of the attending physician and, indeed, of the medical profession itself, are evident, are not to be avoided, and are necessarily an inherent part of the abortion decision."

I am unaware of this Court's authority, acting on its own and purporting to exercise its constitutional powers, to approve or disapprove of the failure of a woman to consult her physician about the non-medical aspects of her decision to have an abortion. Missouri has not made such consultation a prerequisite to a legal abortion, although of course the State may require that abortions be performed by doctors. Physicians may refuse to perform the procedure, but it is unrealistic to suggest that all or even most of them insist on participating in other than the strictly medical consideration in connection with

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Fn. page 4

fn. 3 continued/

the decision to abort. I doubt that this Court has  
the power to decree otherwise.



I agree with the Court that the patient consent provision in § 3(2) is constitutional. While § 3(2) obviously regulates the abortion decision during all stages of pregnancy, including the first trimester, I do not believe it conflicts with the statement in *Roe v. Wade*, 410 U.S., at 163, that "for the period of pregnancy prior to [approximately the end of the first trimester] the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by any method free of interference by the State." 410 U.S., at 163. That statement was made in the context of striking a state law aimed at dissuading a woman's decision to have an abortion. It was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion.

As to the provision of the law that requires a husband's consent to an abortion, Section 3(3), the primary issue that



it raises is not whether the State may "delegate" its authority to prevent abortions to the potential father, but rather whether it may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See Stanley v. Illinois, 405 U.S. 645; Skinner v. Oklahoma, 316 U.S. 535. But the Court has recognized as well that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." 410 U.S., at 153 (emphasis added). In assessing the constitutional validity of § 3(3) we are called upon to choose between these competing rights. I agree with the Court that since "it is the woman who physically bears the child and who is the more immediately and directly affected by the pregnancy . . . [t]he balance weighs in her favor." Ante, at 16.

suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child. \*

---

\* For some of the considerations that support the state's interest in encouraging parental consent, see the opinion of Mr. Justice Stevens, concurring in part and dissenting in part. Ante, at \_\_\_\_.

With respect to the state law's requirement of parental consent, Section 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in Bellotti v. Baird, \_\_\_ U.S. \_\_\_,

\_\_\_, makes it plain that a provision requiring parental consent for abortion in the first instance but excusing that requirement upon a prompt judicial determination that the minor is mature enough to give an informed consent or that abortion is in the minor's best interest would present a materially different constitutional issue. Such a provision would not absolutely condition the minor's right on the parent's approval but would encourage consultation between parent and child.

Rider A  
w/ note

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under

emotional stress, may be ill-equipped to make it without  
mature advice and emotional support. <sup>1/</sup> It seems unlikely  
that she will obtain adequate counsel and support from the  
attending physician at an abortion clinic, where abortions  
for pregnant minors frequently take place. <sup>2/</sup>

I would not reach the constitutionality of Section 7 of  
the Act, dealt with in Part IV(E) of the Court's opinion. I  
agree with MR. JUSTICE WHITE that the physicians in this  
case do not have standing to assert the unconstitutionality of  
that provision. Like him, therefore, I would remand this issue  
to the District Court to determine whether Planned Parent-  
hood of Central Missouri has standing, and, if it does not,  
to dismiss the complaint insofar as it challenges § 7. *E. Ky. & W. Va.*

As to the constitutional validity of Section 9 of the Act, pro-  
hibiting the use of the saline amniocentesis procedure, I agree  
fully with the views expressed by MR. JUSTICE STEVENS.  
And as to the recordkeeping provision of the law, discussed  
in Section IV(G) of the Court's opinion, I agree with the Court's

views except insofar as they would seem to elevate the "professional soundness" of medical record-keeping into a constitutional requirement.

In short, I concur in the judgment, except insofar as it invalidates Section 7 of the Act.



FOOTNOTES

1/ The Court states that "[i]f a minor is incapable of giving meaningful consent, the appropriate concerned party, whether parent, guardian, or guardian ad litem, must be the decisionmaker along with the minor and the physician." Ante, at 20. If this means that the Constitution requires a State to make the parent or guardian a joint decisionmaker in such cases, I cannot agree.

2/ The mode of operation of one such clinic is revealed by the record in *Hellert v. Baird*, supra, and accurately described in the Brief for the Appellants in that case.

"The counseling . . . occurs entirely on the day the abortion is to be performed. It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . . The physician takes no part in this counseling process . . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . ."

"The abortion itself takes five to seven minutes . . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic] the physician, . . . may be performing abortions on many other adults and minors . . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room . . . ."

While I have no doubt, contrary to the Court's suggestion, any, at 21, that the State may constitutionally permit such "assembly line" clinics to operate, I am equally confident that the State has the power to provide that potential or carried minor patrons must seek parental advice and consent before utilizing their services.

June 18, 1976

No. 74-1151 Planned Parenthood v. Danforth  
No. 74-1419 Danforth v. Planned Parenthood

Dear Potter:

I would appreciate your adding my name to your opinion in the above cases, concurring in part and dissenting in part.

I understand that you are making the changes we discussed.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

P. 3  
9 advised  
Stewart that  
these changes  
are OK with me.  
printed  
1st DRAFT

FILE  
By: Mr. Justice Stewart  
dated: \_\_\_\_\_  
JUN 21 1976

**SUPREME COURT OF THE UNITED STATES**

Nos. 74-1151 AND 74-1419

Planned Parenthood of Central Missouri et al.,  
Appellants,  
74-1151 v.  
John C. Danforth, Attorney General of the State of Missouri, et al.  
John C. Danforth, Attorney General of the State of Missouri, Appellant,  
74-1419 v.  
Planned Parenthood of Central Missouri et al.

On Appeals from the United States District Court for the Eastern District of Missouri.

Joining the Court's

[June —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring in part and dissenting in part.

While I agree with much of the Court's reasoning and most of its conclusions, I write separately to indicate my understanding of the constitutional issues raised by this case, and to register my dissent from Part IV (E) of the Court's opinion.

With respect to the definition of viability in § 2 (2) of the Act, it seems to me that the critical consideration is that the statutory definition has almost no operative significance. The State has merely required physicians performing abortions to certify that the fetus to be aborted is not viable. While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's

## 2 PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

professional decision to perform an abortion will be "chilled."

I agree with the Court that the patient consent provision in § 3(2) is constitutional. While § 3(2) obviously regulates the abortion decision during all stages of pregnancy, including the first trimester, I do not believe it conflicts with the statement in *Roe v. Wade*, 410 U. S., at 163, that "for the period of pregnancy prior to [approximately the end of the first trimester] the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U. S., at 163. That statement was made in the context of invalidating a state law aimed at thwarting a woman's decision to have an abortion. It was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion.

As to the provision of the law that requires a husband's consent to an abortion, § 3(3), the primary issue that it raises is ~~not~~ whether the State may ~~delegate~~ its authority to prevent abortions to the potential father, but ~~whether it~~ may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See *Stanley v. Illinois*, 405 U. S. 645; *Skinner v. Oklahoma*, 316 U. S. 535. But the Court has recognized as well that the Constitution protects "a woman's decision, whether or not to terminate her pregnancy." 410 U. S. at 153 emphasis

rather



## PLANNED PARENTHOOD OF MISSOURI v. DANFORTH 3

added). In assessing the constitutional validity of § 3 (3) we are called upon to choose between these competing rights. I agree with the Court that since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor." *Id.* at 16.

With respect to the state law's requirement of ~~parental~~ <sup>parental</sup> consent, § 3 (4) I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird*, 443 U. S. 622, 1980, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.<sup>1</sup>

There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.<sup>2</sup> It seems unlikely that she will

<sup>1</sup>The scope of the precedent in this respect is the State's interest in encouraging parental consent, as the opinion of Mr. Justice STEVENS, concurring in part and dissenting in part, *Post* at —.

<sup>2</sup>The Court states that "[i]f a minor is capable of giving meaningful consent, the appropriate consented party, whether par-

4. PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

~~I could not reach the constitutionality of § 1 of the Act, dealt with in Part IV (E) of the Court's opinion. I agree with Mr. Justice WHITE that the physicians in this case do not have standing to assert the unconstitutionality of that provision. Like him, therefore, I would remand this issue to the District Court to determine whether Planned Parenthood of Central Missouri has standing, and if it does not to dismiss the complaint in~~

it. guardian, or guardian ad litem must be the decisionmaker along with the minor and the physician." Ante, at 26. It is clear that the Constitution requires a State to make the parent or guardian a joint decisionmaker in such cases.

The mode of operation of one such clinic is revealed by the record in *Rodriguez v. Raul*, supra, and accurately described in the Brief for the Appellants in that case.

"The counseling . . . occurs entirely on the day the abortion is to be performed. . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another. . . . The physician takes no part in this counseling process. . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques. . . .

"The abortion itself takes five to seven minutes. . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the clinic, the physician, . . . may be performing abortions on many other adults and minors. . . . On days when patients are scheduled in separate groups consisting usually of five patients. . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room. . . ." *Id.*, at 43-44.

~~While I have no doubt, contrary to the Court's suggestion, ante, at 21, that the State may constitutionally permit such "counseling," I am equally confident that the State has the power to provide that in most instances, unmarried minor patients must seek parental advice and consent before undergoing these~~

I do not understand this to

PLANNED PARENTHOOD OF MISSOURI v. DANFORTH 5

~~Solar is re-challenged § 7. - See, e. g., March v. Solari, 422 U.S. 499; Sacco Club v. Morton, 405 U.S. 727.~~

As to the constitutional validity of § 9 of the Act, prohibiting the use of the saline amniocentesis procedure, I agree fully with the views expressed by Mr. Justice STEVENS. And as to the recordkeeping provisions of the Act discussed in Part IV (C) of the Court's opinion, I agree with the Chief Justice except insofar as they would seem to elevate the "professional soundness" of medical recordkeeping into a constitutional requirement.

In short, I concur in the judgment except insofar as it invalidates § 7 of the Act.

P.3  
 This op. - on  
 which PS & 9  
 collaborated resulted  
 in Harry making revisions of  
 a helpful version of  
 the opinion he previously  
 circulated.

printed  
 1st DRAFT

# SUPREME COURT OF THE UNITED STATES

Nos. 74-1151 AND 74-1419

Planned Parenthood of Cen-  
 tral Missouri et al.,  
 Appellants,

74-1151 v.

John C. Danforth, Attorney  
 General of the State of  
 Missouri, et al.

John C. Danforth, Attorney  
 General of the State of  
 Missouri, Appellant,

74-1419 v.

Planned Parenthood of Cen-  
 tral Missouri et al.

On Appeals from the  
 United States District  
 Court for the Eastern  
 District of Missouri.

[June —, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring in part and dissenting in part.

While I agree with much of the Court's reasoning and most of its conclusions, I write separately to indicate my understanding of the constitutional issues raised by this case and to register my dissent from Part IV (E) of the Court's opinion.

With respect to the definition of viability in § 2 (2) of the Act, it seems to me that the critical consideration is that the statutory definition has almost no operative significance. The State has merely required physicians performing abortions to certify that the fetus to be aborted is not viable. While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's

27P  
 Mr. Justice Brennan  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated:

JUN 21 1976  
 (Keep  
 in file  
 as part  
 of  
 history  
 of this  
 case.)

## • PLANNED PARENTHOOD OF MISSOURI v. DANFORTH

professional decision to perform an abortion will be called.

I agree with the Court that the patient consent provision, § 33.02, is constitutional. While § 33.02 obviously regulates the abortion decision during all stages of pregnancy, including the first trimester, I do not believe it conflicts with the statement in *Roe v. Wade*, 410 U.S. at 163, that "for the period of pregnancy prior to [approximately the end of the first trimester] the attending physician, in consultation with his patient, is free to determine whether regulation by the State, that is his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." 410 U.S. at 163. That statement was made in the context of invalidating a state law aimed at thwarting a woman's decision to have an abortion. It was not intended to preclude the State from enacting a provision aimed at ensuring that the abortion decision is made in a knowing, intelligent, and voluntary fashion.

As to the provision of the law that requires a husband's consent to an abortion, § 33.03, the primary issue that it raises is not whether the State may "debar" its authority to prevent abortions to the potential father, but whether it may constitutionally recognize and give effect to a right on his part to participate in the decision to abort a jointly conceived child. This seems to me a more difficult problem than the Court acknowledges. Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom. See *Stach v. Brown*, 405 U.S. 645; *Stewart v. California*, 316 U.S. 535. But the Court has recognized as well that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 158 (emphasis



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added: "In assessing the constitutional validity of § 3(3), we are called upon to choose between these competing rights. I agree with the Court that since "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . the balance weighs in her favor." *Id.*, at 16.

With respect to the state law's requirement of parental consent, § 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Belton v. Baird*,<sup>1</sup> 453 U.S.

suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt judicial resolution of any disagreement between the parent and the minor or the judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

There can be little doubt that the State further is constitutionally permissible and by encouraging its unmarried, pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of twelve years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will

<sup>1</sup> 453 U.S. 107, 67 L.Ed.2d 252, 49 AFR2d 101 (1981). The Supreme Court has also held that a state law requiring parental consent to the abortion of the minor is unconstitutional and violating the right of privacy. *Roe v. Wade*, 410 U.S. 113, 36 L.Ed.2d 191, 70 S.Ct. 421 (1966).

The Court also held that a state law requiring parental consent to the abortion of the minor is unconstitutional and violating the right of privacy. *Roe v. Wade*, 410 U.S. 113, 36 L.Ed.2d 191, 70 S.Ct. 421 (1966).

I would not reach the constitutionality of § 7 of the Act dealt with in Part IV (E) of the Court's opinion. I agree with Mr. Justice White that the physicians in this case do not have standing to assert the unconstitutionality of that provision. Like him, therefore, I would regard this issue to the District Court to determine whether Planned Parenthood of Central Missouri has standing, and, if it does not, to dismiss the complaint in

The myoelectric properties of the electrode are revealed by the second and third. Based on the electrode characteristics described in the literature (see Appendix 1) and the above:

There is much experimental evidence supporting this. The physics of the poor conductors is the same as that of the metals and is being performed in the laboratory, the physics of the normal conducting elements and of other materials is being done in the laboratory and is being done in groups consisting of the top physicists. On the other hand, the discovery of the high temperature superconductors is the only one of the great discoveries of the last 60 years.

While I have made the attempt to be fair and suggest the policy options that the State may not have considered, I am not suggesting that the State has not considered all options. I am only suggesting that the State has not considered all options that may be available to it. I am not suggesting that the State has not considered all options that may be available to it.

PLANNED PARENTHOOD OF MISSOURI, L. 1000011—5

set as it challenges § 7. See, e.g., *Harlow v. Seldon*, 422 U.S. 400; *Sierra Club v. Morton*, 405 U.S. 727.

As to the constitutional validity of § 7 of the Act, prohibiting the use of the saline amniocentesis procedure, I agree fully with the views expressed by Mr. Justice Stevens. And as to the recordkeeping provisions of the law discussed in Part IV (c) of the Court's opinion, I agree with the Court's views except insofar as they would seem to elevate the "professional soundness" of medical recordkeeping into a constitutional requirement.

In short, I concur in the judgment, except insofar as it invalidates § 7 of the Act.

Supreme Court of the United States  
Washington, D. C. 20543

JUSTICE POTTER STEWART



June 28, 1976

Re: Nos. 74-1151 and 74-1419  
Planned Parenthood of Missouri v. Danforth

Dear Harry,

Upon the understanding that you will delete the last paragraph beginning on page 13 and running over onto page 14 (including note 8) and will revise the last paragraph on page 22 in accord with our telephone conversation, I am glad to join your opinion for the Court in this case. I shall shortly send to the printer a concurring opinion, which will be an abbreviated version of my previous circulation but which will make clear that I join your opinion for the Court.

Sincerely yours,

P.S.  
✓

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

OFFICE OF  
JUSTICE FRANK A. BLACKMUN

June 28, 1976

✓

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1151 - Planned Parenthood v. Danforth;  
No. 74-1419 - Danforth v. Planned Parenthood.

A suggestion has been made that the last sentence of the paragraph at the top of page 28 be replaced with:

"Obviously, the State may not require execution of approval and parental consent forms that have been invalidated today."

This is a good suggestion, and I shall adopt it.

H. G. B.



Supreme Court of the United States  
Washington, D. C. 20543

WAB:GSP  
JUDGE ROBERT A. BLACKMON

June 28, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 74-1151 - Planned Parenthood v. Danforth  
No. 74-1419 - Danforth v. Planned Parenthood

Potter and I have agreed that the paragraph beginning at the bottom of page 13 and carrying over to page 14 should be eliminated.

With respect to the full paragraph on page 22, we have agreed to retain the first sentence, the citation to Pellotti v. Baird, and the two final sentences. This means that there will be eliminated the second sentence of the paragraph and the three sentences following the Pellotti citation, and the citation to Mo. laws.

HB

Dear Harry,

I will now join your opinion for the Court, as it has been revised.

I also will remain with Potter's brief concurrence.

Sincerely,

June 28, 1976

No. 74-1151 Planned Parenthood v. Danforth  
No. 74-1419 Danforth v. Planned Parenthood

Dear Harry:

I will now join your opinion for the Court, as it has been revised.

I also will remain with Potter's brief concurrence.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE GREGORY WHITE

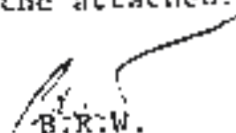
June 29, 1976

Memorandum to the Conference

Re: Nos. 74-1151 & 74-1419 - Planned Parenthood  
v. Danforth

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In response to Brother Blackmun's latest amendments in the above case, Insert A contained in my dissent as circulated on June 28, has now been amended in accordance with the attached.

  
B.R.W.

Insert A--Planned Parenthood

At bottom the majority's holding--as well as the concurrence--rests on its factual finding that the prostaglandin method is unavailable to the women of Missouri. It therefore concludes that the ban on the saline method is "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks," ante, at 25. This factual finding was not made either by the majority or by the dissenting judge below. Appellants have not argued that the record below supports such a finding. In fact the record below does not support such a finding. There is no evidence in the record that women in Missouri will be unable to obtain abortions by the prostaglandin method. What evidence there is in the record on this question supports the contrary conclusion.<sup>3/</sup> The record discloses that the prostaglandin method of abortion was the country's second most common method of abortion during the second trimester, Trial Transcript, at 42, 89-90; that although the prostaglandin method had previously been available only on an experimental basis,

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<sup>3/</sup> The absence of more evidence on the subject in the record seems to be a result of the fact that the claim that the prostaglandin method is unavailable was not part of the litigating strategy below.

it was, at the time of trial, available in "small hospitals all over the country." Trial Transcript, at 342; that in another year or so the prostaglandin method would become--even in the absence of legislation on the subject--the most prevalent method. Anderson Deposition, at 47. Moreover, one doctor quite sensibly testified that if the saline method were banned, hospitals would quickly switch to the prostaglandin method.

The majority relies on the testimony of one doctor that--as already noted--prostaglandin had been available on an experimental basis only until January 1, 1974; and that its manufacturer, the Upjohn Company, restricted its sales to large medical centers for the following six months, after which sales were to be unrestricted. Trial Transcript, 334, 335. In what manner this evidence supports the proposition that prostaglandin is unavailable to the women of Missouri escapes me. The statute involved in this case was passed on June 14, 1974; evidence was taken in July, 1974; the District Court's decree sustaining the ban on the saline method which this Court overturns was entered in January, 1973; and this Court declares the statute unconstitutional in June of 1976. There is simply no evidence in the record that prostaglandin was or is unavailable at any time relevant to this case. Without such evidence and without any factual finding by the court below this Court cannot properly strike down a statute passed by one of the States. Of course, there is no burden on a State to establish the constitutionality



of one of its laws. Absent proof of a fact essential to its unconstitutionality, the statute remains in effect.

The only other basis for its factual finding which the majority offers is a citation to another case--Wolfe v. Schroering, 388 F. Supp. 631, 637 (1974)--in which a different court concluded that the record in its case showed the prostaglandin method to be unavailable in another State--Kentucky--at another time--two years ago. This case must be decided on its own record. I am not yet prepared to accept the notion that normal rules of law, procedure and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion. The majority's finding of fact that women in Missouri will be unable to obtain abortions after the first trimester if the saline method is banned is wholly unjustifiable.

In any event,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 30, 1976



Re: ( 74-141 - Planned Parenthood v. Danforth  
( 74-1419 - Danforth v. Planned Parenthood

Dear Byron:

Please show me joining your opinion.

Regards,

Mr. Justice White

Copies to the Conference

