In the

Supreme Court of the United States

JANE ROE, et al.,)
)
Appellants,)
)
v.) No. 70-18
)
HENRY WADE,)
)
Appellee.)

Roe v. Wade #70-18
see also 1971 term v.2

Washington, D.C.
October 11, 1972

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JANE ROE, et al., Appellants,	:	
v.	:	No. 70-18
HENRY WADE, Appellee.	:	

Washington, D. C.,

Wednesday, October 11, 1972.

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

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

APPEARANCES:

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

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

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument first if No. 70-18, Roe against Wade.

Mrs. Weddington, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. SARAH R. WEDDINGTON,

ON BEHALF OF THE APPELLANTS

MRS. WEDDINGTON: Mr. Chief Justice, and may it please the Court:

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

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

In the original action she was joined by a married couple, John and Mary Doe. Mrs. Doe had a medical condition,

her doctor had recommended, first, that she not get pregnant, and, second, that she not take the pill.

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

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

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

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

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

MRS. WEDDINGTON: Prosecutions of doctors, yes, sir.

The problem that we face in Texas is that even

though we were granted a declaratory judgment, ruling the law unconstitutional, even though we've been before this Court once in the past, in Texas women still are not able to receive abortions from licensed doctors, because doctors still fear that they will be prosecuted under the statute.

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

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

MRS. WEDDINGTON: Yes, it's just --.

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

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

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

And yet we can certainly show that it is a

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

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

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

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

That, in fact, the maternal mortality rate has decreased by about two-thirds to a record low in New York in 1971. That now, in 1971, New York recorded the lowest

infant mortality rate ever in that State. That during the first 18 months of -- well, from July 1st, 1970, to December 31st, 1971, out-of-wedlock pregnancies have dropped by 14 percent.

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

As to the women, this is their only forum. They are in a very unique situation, for several reasons: First, because of the very nature of the interest involved. Their primary interest being the interest associated with the question of whether or not they will be forced by the State to continue an unwanted pregnancy.

In our original brief we alleged a number of constitutional grounds. The man one that we are relying on before this Court are the Fifth, the Ninth, and the Fourteenth Amendments.

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

The Court has in the past, for example, held that it is the right of the parents and of the individual to

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

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

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

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

QUESTION: Newman.

MRS. WEDDINGTON: Excuse me?

QUESTION: Newman, I think.

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

And Judge Lombard concurred.

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

In part of the language of that case, it pointed out that no decision -- and I'm quoting -- of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a State interest which is subject to such a variety of personal judgments. And certainly the amicus briefs before the Court show the variety of personal judgments that come to bear on this particular situation.

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

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

compensated by some sort of monetary reward.

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

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

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

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

It's a very unique kind of harm, certainly, that was

done to them. Even though there are many cases, some very recent, from this Court, talking about the problem of when a State may interfere, or the federal judiciary may interfere when there is a pending State criminal prosecution.

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

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

The State has alleged, and its only alleged interest in this statute is the interest in protecting the life of the unborn. However, the State has not been able to point to any authority, of any nature whatsoever, that would demonstrate that this statute was in fact adopted for that purpose.

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

of the crime, and is the only victim that the court talks about.

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

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

MRS. WEDDINGTON: That's correct.

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

And in both cases it was held that the fetus had

no constitutional rights.

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

There is also, of course, --

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

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

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

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

And the State is alleging a compelling State interest in --

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

MRS. WEDDINGTON: All of the cases, the prior history of this statute, the common law history would indicate that it is not. The State has shown no --

QUESTION: Well, what about -- would you lose your

case if the fetus was a person?

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

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

MRS. WEDDINGTON: Excuse me?

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

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

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

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

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

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

particular situation.

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

MRS. WEDDINGTON: Our statute does not.

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

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

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

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

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

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

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

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

MRS. WEDDINGTON: That's correct.

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

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

QUESTION: That's a recent case?

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

QUESTION: Again on vagueness.

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

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

In Texas that's not the judgment he's forced to make.

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

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

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

QUESTION: So you're relying on both?

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

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

MRS. WEDDINGTON: Okay.

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

MRS. WEDDINGTON: I am.

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

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

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

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

MRS. WEDDINGTON: None of them has --

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

MRS. WEDDINGTON: Okay.

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

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

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

QUESTION: Of course it's the only definitive

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

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

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

MRS. WEDDINGTON: Yes, sir.

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

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

But here we have a person, the woman, entitled to

fundamental constitutional rights as opposed to the fetus prior to birth, where there is no establishment of any kind of federal constitutional rights.

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

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

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

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

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

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

MRS. WEDDINGTON: I would have a very difficult

case.

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

MRS. WEDDINGTON: That's correct. That --

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

Did you want to respond further to him?

MRS. WEDDINGTON: No, Your Honor.

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

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

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

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

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

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

QUESTION: But that has been recognized in the period before birth for purposes of injury claims, and you put that, I take it, in the property category?

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

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Flowers.

ORAL ARGUMENT OF ROBERT C. FLOWERS, ESQ.,

ON BEHALF OF THE APPELLEE

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

The lower court in Dallas held the Texas abortion law unconstitutional primarily on the two grounds that have

just been discussed, on the vagueness question and the rights of the mother under the Ninth Amendment.

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

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

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

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

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

MR. FLOWERS: From a constitutional standpoint, no, sir. I think it's fairly and squarely before this Court.

We don't envy the Court for having to make this decision.

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

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

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

MR. FLOWERS: No, sir. I understand. But the Fifth Amendment, under the Fifth Amendment: no one shall be deprived of the right to life, liberty, and property without the due process of law.

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

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

QUESTION: All right.

Any person born or naturalized in the United States.

MR. FLOWERS: Yes, sir.

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

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

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

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

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

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

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

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

MR. FLOWERS: I think that's true, sir. But from a layman's standpoint, medically speaking, we would say that at the moment of conception from the chromosomes, every

potential that anybody in this room has is present, from the moment of conception.

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

MR. FLOWERS: Yes, sir.

QUESTION: With which everyone can agree.

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

I think that --

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

MR. FLOWERS: Yes, sir.

QUESTION: In any circumstance?

MR. FLOWERS: It would, yes, sir.

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

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

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

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

QUESTION: Well, --

MR. FLOWERS: The protection of the mother.

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

[Laughter.]

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

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

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

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

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

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

MR. FLOWERS: Yes, sir.

QUESTION: Why?

MR. FLOWERS: As far as --

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

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

QUESTION: Well, a brain operation could.

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

QUESTION: Well, if a doctor performs a brain operation and does it improperly, he could be guilty of manslaughter, couldn't he?

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

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

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

If you will permit me to --

QUESTION: But is it in issue here?

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

QUESTION: Maybe the reason is: why have two

statutes?

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

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

QUESTION: What does that statute mean?

MR. FLOWERS: Sir?

QUESTION: What does it mean?

MR. FLOWERS: I would think that --

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

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

QUESTION: Which is not an abortion.

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

Gentlemen, we feel that the concept of a fetus being within the concept of a person, within the framework

of the United States Constitution and the Texas Constitution, is an extremely fundamental thing.

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

MR. FLOWERS: Your Honor, --

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

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

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

We have a --

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

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

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

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

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

MR. FLOWERS: Yes, sir.

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

MR. FLOWERS: Yes, sir.

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

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

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

MR. FLOWERS: Yes, sir.

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

MR. FLOWERS: Yes, sir.

QUESTION: So that there are other assertions --

MR. FLOWERS: Yes, sir.

QUESTION: -- or procedures which could be criminal?

MR. FLOWERS: That's right.

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

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

QUESTION: Those statutes apply to doctors?

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

QUESTION: Do you have any case that says so?

MR. FLOWERS: No, sir.

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

Your Honor, I'd like to call the attention of the Court, that the unborn child -- that this Court has not been blind to the rights of the unborn child in the past. In the Memorial case, vs. Anderson, a New Jersey Supreme Court case, the Court -- this was the case where the pregnant woman had refused, on religious grounds, to undergo a blood transfusion in order to save the child.

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

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

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

The Court recognized the life of the embryo, and stated that it would have been easier for the mother, and less

expensive for the father; this alleged detriment cannot stand against the preciousness of one single life.

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

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

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

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

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

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

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

MR. FLOWERS: Yes, sir.

QUESTION: That's what would keep the Legislature, I suppose, from classifying people that have been born as not persons.

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

[Laughter.]

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

QUESTION: Well, that's been the theory up until now on the lawbooks.

[Laughter.]

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

human being, after conception.

Well, Your Honor, --

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

MR. FLOWERS: Yes, sir.

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

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

QUESTION: -- the judicial meaning of it.

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

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

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

MR. FLOWERS: Only that --

QUESTION: Medical.

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

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

inception?

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

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

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

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

QUESTION: And that's it?

MR. FLOWERS: Yes, sir.

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

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

could give it to you after research.

QUESTION: Mr. Flowers, --

MR. FLOWERS: Yes, sir.

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

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

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

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

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

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

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

QUESTION: Where is that you're reading from?

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

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

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

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

QUESTION: I didn't think so.

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

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

who are being governed by it.

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

MR. FLOWERS: That's right, yes.

QUESTION: Allowing the killing of people.

MR. FLOWERS: Yes, sir.

QUESTION: A person.

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

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

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

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

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

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

MR. FLOWERS: Yes, sir, it is.

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

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

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

I don't think anyone has faced the fact, in making a decision, whether this is a life, in a person concept.

Thank you, Your Honors.

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

MR. FLOWERS: Your Honor, in 1854.

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

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

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

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

QUESTION: Then it was legal.

MR. FLOWERS: Yes, sir.

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

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

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

MR. FLOWERS: When it was a Republic?

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

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

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

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

QUESTION: In fact, the latter half of the Nineteenth Century?

MR. FLOWERS: Yes, sir.

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

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

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

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

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

MR. FLOWERS: Yes, sir.

QUESTION: As had been done in England.

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

Thank you, Your Honor.

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

REBUTTAL ARGUMENT OF MRS. SARAH R. WEDDINGTON,

ON BEHALF OF THE APPELLANTS

MRS. WEDDINGTON: Thank you, Your Honor.

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

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

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

MRS. WEDDINGTON: At this --

QUESTION: Right up until the moment of birth.

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

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

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

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

MRS. WEDDINGTON: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MRS. WEDDINGTON: To providing a --

QUESTION: However life was defined.

MRS. WEDDINGTON: That's correct.

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

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

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

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

In this case, this Court is faced with a situation where there have been fourteen three-judge courts that have

ruled on the constitutionality of abortion statutes. Nine courts have favored the woman, five have gone against her. Twenty-five judges have favored the woman, seventeen have gone against her. Nine Circuit Judges have favored the woman, five have gone against her. Sixteen District Court judges have favored the woman, ten have gone against her.

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

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

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

Our supplemental brief, on page 14, points out that the brief of the opposition can't quite decide when life does begin. At one point they suggest it's when there's implantation. A few pages later they suggest it's with conception.

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

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

QUESTION: But the State may not; yes.

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

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

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

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

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

an abortion".

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

QUESTION: And then what does she do?

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

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

MRS. WEDDINGTON: Thank you.

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

The case is submitted.

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